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[*THIRD EDITION.*]

A
CONCISE TREATISE
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The Law
OF
ARBITRATIONS & AWARDS,
WITH
An Appendix
OF
PRECEDENTS AND STATUTES.

BY
JOSEPH HAWORTH REDMAN,
OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,
*Author of "A Treatise on the Law of Railway Companies as Carriers," "The
Law of Landlord and Tenant," &c.*

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PREFACE

TO THE THIRD EDITION.

SINCE the publication of the last Edition the Arbitration Act, 1889, has been passed. Beyond providing that certain usual and common form stipulations shall be implied in every submission out of court, the Act is limited to practice and procedure. Nevertheless, the abolition of the necessity for making a submission a rule of court, the simplification of the procedure in enforcing an award, the enlarged jurisdiction of a Master in Chambers to deal with matters arising in the course of a reference, and other alterations of a minor character effected by the Act, have rendered obsolete much of the old law, which has been omitted. The old law on the construction of statutory provisions, which are re-enacted in substance, is necessarily retained. Some of the old law with reference to provisions which are repealed and not re-enacted, but for which a substituted procedure is enacted, is, in a few instances, retained by way of argument or illustration, pending affirmative decisions under the new Act.

In the general result, however, I have been enabled to incorporate the law up to date without increasing the bulk of the book. I am thus able to satisfy my original object—to keep it a portable work sufficiently full in

its statement of principles, with illustrations from the decisions, to guide the professional man upon the various questions which arise in the course of a reference and afterwards.

The general arrangement of the work has been retained. The precedents and forms have necessarily undergone considerable alteration, excision and addition.

J. H. REDMAN.

2. NEW COURT. LINCOLN'S INN.

October, 1897.

PREFACE

TO THE FIRST EDITION.

THE author's aim in the present work has been to furnish, within the limits of a volume of modest bulk, a concise but complete statement of all points of law and practice affecting Arbitrations, from the inception to the final determination of the fate of the award. The necessity for such a book is sufficiently evidenced by the constant complaint of professional men engaged in references, that they have no portable work on the subject. That the author has performed the task of condensation and selection to the satisfaction of all he cannot hope, but he does trust that he has performed it in such a manner as to make the result generally useful.

In the Appendix precedents have been given applicable to the most frequently recurring references; at the same time considerable pains have been taken to frame them so as to be easily adapted to references, where the subject-matter, or the relation of the parties, is different. Seeing that the subjects of reference are as multifarious as the causes of civil litigation, it would have necessitated a volume more than double the size of the present to have given forms of awards applicable to all possible varieties of circumstances; the forms contained herein will, however, serve as guides where they cannot be exactly followed

as precedents. When the draftsman can find no precedent for the award he wishes to make, he should define clearly to himself what he wishes to direct, ascertain that it is within the limit of his authority, and then direct it to be done in such language as a man of ordinary common sense can understand, and with such exactness that a dishonest party cannot say that it leaves him any doubt as to the how, when, and where of performance.

J. H. R.

March, 1872.

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THE LAW OF ARBITRATIONS AND AWARDS.

CHAPTER I.

INTRODUCTORY—DEFINITIONS—FRAMING SUBMISSIONS.

AT common law any agreement by which parties refer an existing or possible future matter in dispute between them to the judicial and final determination of a third person, who is named, is called a submission; the person to whom the reference is made, an arbitrator; when the reference is made to more than one, and provision is made that, in case they shall disagree, another shall decide, that other is called an umpire; the judgment pronounced by an arbitrator or arbitrators, an award; that by an umpire, an umpirage, or, less properly, an award.

By statute, in particular cases, certain defined notices and proceedings are made equivalent to a submission by agreement. Thus, section 25 of the L. C. C. Act, 1845 (8 & 9 Vict. c. 18), enacts that an appointment of an arbitrator thereunder "shall be deemed a submission to arbitration on the part of the party by whom the same shall be made." (*Rhodes v. Airedale Drainage Commissioners*, 1 C. P. D. 402; 45 L. J., C. P. 861; *Bidder v. North Staffordshire Railway Co.*, 4 Q. B. D. 412; 48 L. J., Q. B. 248.) Under section 12 of The Agricultural

CHAP. I.

Definitions.
Submission at
common law.

Under special
statutes.

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Holdings Act, 1883 (46 & 47 Vict. c. 61), the delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it. Similar provisions are contained in The Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 180), and in other statutes.

Under the
Arbitration
Act, 1889.

“Written
agreement.”

In the Arbitration Act, 1889 (52 & 53 Vict. c. 49), “submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not (s. 27). An agreement means the assent of both parties to the same set of terms; and where the parties signed two separate documents, one of which contained a clause for reference and the other did not, there was held to be no submission (*Caerleon Tinplate Co. v. Hughes*, 60 L. J., Q. B. 640; 65 L. T. 118). It is not, however, necessary that the agreement should be signed by both parties, provided it is binding upon both. (*Baker v. Yorkshire Fire and Life Assurance Co.* [1892], 1 Q. B. 144; 61 L. J., Q. B. 838.) The indorsement on their briefs by counsel representing litigant parties, of an agreement to refer, is a written agreement within the section. (*Aitken v. Batchelor*, 62 L. J., Q. B. 193; 68 L. T. 530.)

Agreement in
form not
contemplated
by Act.

The Act does not contemplate a reference to three arbitrators, and in the case of a mere agreement to refer which does not appoint the arbitrators and provides for a reference to three arbitrators, one to be appointed by each party and the third by the two so appointed, as distinguished from two arbitrators and an umpire, the Act does not enable the court to compel one of the parties to appoint an arbitrator. (*Re Smith and Nelson's Arbitration*, 25 Q. B. D. 545; 59 L. J., Q. B. 533.)

References
which are not
to arbitration.

The first element of a submission to arbitration is, that it should show an intention of the parties to be concluded by the decision of the arbitrator. But a mere agreement between two persons to be concluded by the decision of a third would not in itself constitute that

third person an arbitrator. To give him that character there must be a "difference" between the parties, or his duties must involve the performance of judicial functions.

Thus, where it is left to a person to whom the matter is referred to put a value upon something which the parties have already agreed shall be paid for, this is not an arbitration in the proper sense of the term, but an appraisement, which in reality prevents differences, and does not settle any which have arisen. (*Collins v. Collins*, 28 L. J., Ch. 184; 26 Beav. 306; *Bos v. Helsham*, L. R., 2 Ex. 72; 36 L. J. Ex. 20; *Turner v. Goulden*, 43 L. J., C. P. 60; L. R., 9 C. P. 57). "If a man is, on account of his skill in such matters, appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose they are not arbitrators, but only valuers." (*Re Dawdy*, 15 Q. B. D. 426; 54 L. J., Q. B. 574, *per* Esher, M.R.) "If it appears from the terms of the agreement by which the matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising—not of settling them when they have arisen—and where the case is not one of arbitration, but of a mere valuation." (*Re Carus-Wilson and Greene*, 18 Q. B. D. 7, *per* Esher, M.R.; *Re Hammond and Waterton*, 62 L. T. 808.)

Arbitration
and valuation
distinguished.

CHAP. I.

Examples of
valuations.

Accordingly it has been held that a person valuing between a landlord or an incoming tenant and outgoing tenant (*Leeds v. Burrows*, 12 East, 1; *Re Dawdy*, *supra*; *Re Hammond and Waterton*, *supra*), or between an incoming and outgoing incumbent (*Jenkins v. Betham*, 24 L. J., C. P. 94; 15 C. B. 168), or between a vendor and a purchaser (*Lee v. Hemingway*, 3 L. J., K. B. 124; *Turner v. Goulden*, *supra*; *Collins v. Collins*, *supra*; *Re Carus-Wilson and Greene*, *supra*), even under the ordinary condition of sale providing for compensation for errors in the particulars (*Bos v. Helsham*, *supra*), is not an arbitrator.

Incidents of
a valuation.

The distinction between a mere valuation and an arbitration is important to be borne in mind. In the case of a valuation the courts have no jurisdiction to interfere between the parties, or enforce their agreement under the Arbitration Act, 1889. (*Re Hammond and Waterton*, 62 L. T. 808; *Lee v. Hemingway*, 3 L. J., K. B. 124; *Collins v. Collins*, 28 L. J., Ch. 184; *Bos v. Helsham*, L. R., 2 Ex. 72; 36 L. J., Ex. 20.) Moreover, an action for negligence would lie against a valuer, but not against an arbitrator. (*Turner v. Goulden*, L. R., 9 C. P. 57.) A valuation would only require to be stamped as an appraisement, not as an award (*Leeds v. Burrows*, 12 East, 1), even though in the form of an award. (*Perkins v. Potts*, 2 Chitt. 399.)

Reference to
value when
an arbitration.

But even a reference to determine the amount of compensation or value to be received by one of the parties, where it involved a judicial inquiry, and the parties were entitled to bring evidence before the arbitrators or umpire, was held to be an arbitration properly so called. (*Re Hopper*, 36 L. J., Q. B. 97; L. R., 2 Q. B. 367; *Re Evans*, 18 W. R. 723; 22 L. T. 501; and see *Vickers v. Vickers*, L. R., 4 Eq. 536.) Where, however, the matter is one of valuation, and two valuers are appointed, the mere fact that an umpire has to be had recourse to, does

not necessarily constitute the umpire an arbitrator in the proper legal sense of the word. (*Re Carns-Wilson and Greene*, 18 Q. B. D. 7; 56 L. J., Q. B. 530; *Re Hammond and Waterton*, 62 L. T. 808; the dicta to the contrary in *Turner v. Goulden*, L. R., 9 C. P. 57, are overruled). If the third person is also an expert, to decide by the exercise of his skill and knowledge, he is but a valuer; if, however, a barrister is chosen, and he has to arrive at his decision by a judicial inquiry, he would probably be held to be in the position of an arbitrator. (*Re Hammond and Waterton*, *supra*, per Williams, J.)

It was held in a case decided in 1829 that where a person was named to ascertain and decide, by inspection of accounts, a dispute as to whether anything was due from one person to another, he was an arbitrator (*Jebb v. McKiernan*, M. & M. 340); but a person is not an arbitrator if he is merely to prepare a statement of accounts. (*Goodyear v. Simpson*, 15 M. & W. 16.)

Person
settling
accounts.

Where by an agreement the rights and liabilities of the one party are made dependent upon the uncontrolled determination of a third person, that is not a submission to arbitration; no dispute can arise, since everything depends upon the decision of the individual named, as, where a building contract provides that no sum shall be due to the contractor until the amount thereof is certified by the engineer or architect of the employer. (*Wadsworth v. Smith*, 40 L. J., Q. B. 118; L. R., 6 Q. B. 332; *Scott v. Corporation of Liverpool*, 28 L. J., Ch. 230; 3 De G. & J. 334.) But where a contract for the sale of locomotives provided for payment upon the certificate of the purchaser's engineer that they were in perfect order, and contained another clause that "all disputes are to be settled by arbitration," and the engineer having refused his certificate the vendors proceeded under the arbitration clause, it was held that "a dispute" had arisen within the clause, and that the award was

Architect or
engineer
giving
certificate.

CHAP. I.

enforceable as such. (*Re Hohenzollern Actien, &c.*, 54 L. T. 596).

Stewards of
races.

The stewards of a horse race are not in the position of arbitrators between the persons who have horses in the race, and the rules of law applicable to arbitrators do not apply to them. (*Parr v. Winteringham*, 28 L. J., Q. B. 123.) But a referee appointed by the parties in a boat race would seem to be in the position of an arbitrator. (*Sadler v. Smith*, 39 L. J., Q. B. 17; L. R., 5 Q. B. 40.)

Local
Government
Board.

Where, under the Local Government Act, 1888, differences between local authorities are to be decided by the Local Government Board, the Board are in the position of an arbitrator. (*Re Kent County Council and Sandgate Local Board* [1895], 2 Q. B. 43; 64 L. J., Q. B. 502; but see 59 & 60 Vict. c. 9, passed in consequence; and see *Bexley Local Board v. West Kent Sewerage Board*, 9 Q. B. D. 518; 51 L. J., Q. B. 456.)

Parties may
attach
incidents of
arbitration by
agreement.

In any case the parties to an agreement of whatever description may attach to it all the incidents of an arbitration properly so called by a stipulation that "these presents shall be deemed to be a submission within the meaning of the Arbitration Act, 1889, and shall have all the incidents of such a submission."

Contract for
reference by
what law
governed.

If a contract is entered into between parties residing in different countries, where different systems of law prevail, the question as to which law is to govern the contract is to be decided by the intention of the parties as gathered from the contract. Where, therefore, two contracting parties resided the one in Scotland the other in England, and the contract contained an arbitration clause good according to English law, but bad according to Scotch law, it was held that, the intention of the parties to refer being clear, the clause was governed by English law. (*Hamlyn v. Talisker Distillery* [1894], A. C. 202; 71 L. T. 1.) The law of the two countries upon the particular point has since been assimilated. (57 & 58 Vict. c. 13.)

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At the present day submissions are usually in writing. In framing a submission great care and precision should be observed, since an unskilful or loosely drawn instrument is often ineffectual to accomplish the purposes for which it was intended, and is seldom unattended with expense or disappointment to some of the parties. The submission should be by an instrument of sufficiently high a nature to enable the arbitrator by his award to accomplish the objects of the reference. Where the reference is under the provisions of a statute, the directions of the statute should be strictly complied with.

Matters to be observed in framing the submission.

The submission should be a clear and specific guide to the arbitrator as to the duties he has to perform and the powers with which he is invested. As to the parties, it should embrace all the persons whose concurrence is necessary to make the award a complete determination of the matters in dispute. As to the matters referred, it should, where possible, clearly define the subject-matter of the reference, so as to enable the arbitrator to make his award upon the precise matters submitted to him. (*Re Green and Balfour*, 63 L. T. 97, 325.) Since the arbitrator derives his authority from the consent of the parties, the submission should invest him with all such extraordinary powers, both as to the conduct of the reference and the directions in the award, as from the peculiarity of the subject-matter, nature of the dispute, or relation of the parties, may be necessary or useful to enable him to fully investigate and finally determine.

The Arbitration Act, 1889 (52 & 53 Vict. c. 49), has considerably shortened submissions by incorporating by implication most of the common provisions formerly contained in carefully drawn submissions. Section 2 of the Act provides that 'a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to this Act so far as they are applicable to the reference under the submission.'

Provisions implied in submissions.

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Apply to all arbitrations.

By force of section 25 of the Act section 2 is made retrospective, and applies to all arbitrations by consent out of court taking place after the commencement of the Act, though the submission was made before. (*Re Williams and Stepney* [1891], 2 Q. B. 257; 60 L. J., Q. B. 235; and see *Re Wilson and Eastern Counties Navigation, &c. Co.* [1892], 1 Q. B. 81; 61 L. J., Q. B. 237.)

A submission implies :—

The following are the provisions contained in the first schedule to the Act :—

To a single arbitrator—when

(a) If no other mode of reference is provided, the reference shall be to a single arbitrator.

To two arbitrators—an umpire.

(b) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

Time for award.

(c) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

[It will probably be held that the word “arbitrators” in this and the following clauses includes a single arbitrator, though not so expressed. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 1.]

Commencement of umpire’s powers.

(d) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

Time for umpirage.

(e) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any

writing signed by him may from time to time enlarge the time for making his award.

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[Singularly, the award of the umpire is not required to be in writing, as in the case of arbitrators.]

(f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

Parties to be examined and produce documents.

(g) The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

Witnesses may be sworn.

(h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

Award to be final.

(i) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid, or any part thereof, and may award costs to be paid as between solicitor and client.

Power over costs.

The only common form stipulations omitted from the above provisions are, that which enables an arbitrator to proceed *ex parte*, and one providing against the death of a party operating as a revocation.

Another matter of vital importance at the outset of a reference is the choice of an arbitrator. Though, as we shall hereafter see, almost anyone may in ordinary cases be chosen as an arbitrator—so that if parties agree

The choice of an arbitrator.

CHAP. I.

to trust the decision of their disputes to the inexperience of a child or the vagaries of an idiot, such decision, when given, will be binding upon them (see *Steff v. Andrews*, 2 Madd. 6)—too great caution cannot be observed in selecting competent and disinterested persons; for if an incompetent or interested person be chosen it will seldom happen that he will not, through some misconduct, error of judgment, or open display of bias, render his award impeachable. In every case where the parties can concur in the choice of one person a single arbitrator is most advisable. Nothing has brought more discredit upon the resort to arbitration than the practice of having two arbitrators, one chosen by each party; for unless such arbitrators are members of the legal profession it is almost impossible to impress upon them that they are not to a greater or less extent expected to attend to the interests of their respective appointors. Besides, it so often happens that the two arbitrators are unable to agree, and have to leave the decision of matters to the umpire, that it practically amounts to the appointment of a single arbitrator. The nature of the reference will often determine the class of person to be selected as arbitrator, but usually the appointment of a person well versed in the law applicable to the cause of dispute will most satisfactorily attain the objects of the reference—namely, to get speedily, and at a comparatively small cost, such a decision as a court of competent jurisdiction would most probably have given. It does not follow, because the dispute involves questions of science, business, or skill, that acknowledged masters in the science, or persons of pre-eminence in the peculiar business or skill, should, or indeed could, advantageously in all cases be chosen arbitrators. The assistance of such persons is always attainable by giving their evidence before the arbitrators in the way in which the evidence of scientific men and experts is usually given in our courts.

CHAPTER II.

WHO MAY BE PARTIES TO A REFERENCE.

CAPACITY to enter into a binding submission to arbitration depends upon the same incidents as capacity to contract generally. Every person capable of making a disposition or release of a right may submit that right to arbitration. (Com. Dig. "Arb." D. 2.) A person who cannot contract cannot submit to arbitration. (Bac. Ab. "Arb." C.)

It has long been established at common law that an infant could make no binding contract except for necessities, or service or unless otherwise obviously for his benefit (*Clements v. London and North-Western Railway Co.* [1894], 2 Q. B. 482; 70 L. T. 896); and a submission by an infant was not binding upon him unless he confirmed it when he came of age. (Roll. Ab. "Enfant," D. 5; Bac. Ab. "Arb." C.; *Godfrey v. Wade*, 6 Moore, 488; *Dowse v. Core*, 3 Bing. 20.) Now it is provided by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), section 2, that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." Except as to contracts beneficial to the infant (*Fellows v. Wood*, 59 L. T. 513), this section applies to all kinds of contracts. (*Miller v. Blankley*, 38 L. T. 527; *Coxhead v. Mullis*, 47 L. J., C. P. 761; 3 C. P. D. 439; *Ex parte Kibble*, 44 L. J., Bank. 63; L. R. 10 Ch. 373; *Re Onslow's Trusts*, 44 L. J., Ch. 628; but see *Duncan v. Dixon*, 44 Ch. D. 211; 59 L. J., Ch. 437; *Edwards v.*

CHAP. II.

Of capacity
to submit
generally.

Infants.

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Carter [1893], A. C. 360; 63 L. J., Ch. 100.) It does away with the effect of a ratification, and there must be a new and independent contract after majority to bind a person to the terms of a contract entered into by him while a minor. (See *Ditcham v. Worrall*, 49 L. J., C. P. 688; 5 C. P. D. 410.)

Parent or
guardian.

A father or guardian may bind himself for an infant's performance of an award in the ordinary way in which one man binds himself for the acts of another. (*Roberts v. Newbold*, Comb. 318; *Gill v. Russell*, Freem. 62; *Bacon v. Dubarry*, 1 Ld. Raym. 246.) If, however, the award direct the performance by the infant of some act of which he is incapable, as the execution of a release, the award will be void (*Knight v. Stone*, W. Jones, 164); but an award is not bad by reason of its directing an infant to pay costs. (*Proudford v. Boyle*, 15 M. & W. 198; 3 D. & L. 524.)

Liability of
other party,
though infant
not bound.

Every one must be presumed to know the legal disability of infants; therefore if a man of full age bind himself jointly with an infant to perform an award the disability of the latter will not free the former from his obligation (Com. Dig. "Arb." D. 2; *Bean v. Newbury*, 1 Lev. 139; *Bowyer v. Blorksidge*, 3 Lev. 17); and if parties to an action agree to refer they cannot defeat the award on the ground that there are infant parties to the action who are not bound by the award. (*Wrightson v. Bywater*, 3 M. & W. 199; *Jones v. Powell*, 6 Dow, 483; *Ex parte Wyld*, 30 L. J., Bank. 10; *Re Warner*, 2 D. & L. 148.) Though, as a general rule, the court will not decree an award to bind an infant (*Carendish v. —*, 1 Ch. Ca. 279; 2 P. W. 450), yet when an infant is a party to an action it will sometimes refer to chambers to ascertain whether it would be for the benefit of the infant that the action should be submitted to arbitration, and will make an order according to the report. (*Davis v. Page*, 9 Ves. 350.)

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Married
women.

At common law a married woman was incapable, except her husband was civilly dead, or where she was trading under the custom of the City of London, of making a valid contract (Redman, Husband and Wife, 52), and with those exceptions she could not enter into a valid submission. To those exceptions were added by statute women deserted by their husbands, and having obtained protection orders, or living apart from their husbands under a decree for judicial separation. (20 & 21 Vict. c. 85, ss. 21, 25, 26.) The capacity of married women to contract has been further extended by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which enacts that, as from the 1st of January, 1883, a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued thereon without joining her husband (s. 1, sub-s. 2), and that every contract, including a contract of reference (*Conolan v. Leyland*, 27 Ch. D. 632; 54 L. J., Ch. 123), entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind her separate property unless the contrary be shown. (Sub-s. 3; and see Married Women's Property Act, 1893 [56 & 57 Vict. c. 63], s. 1.)

A wife can only by her submission bind property which is her separate property. As to her chattels, real and personal, if any, which by the marriage have vested in her husband, whether originally belonging to her in her own right (*Smith v. Ward*, Styles, 351; *Oglander v. Bastou*, 1 Vern. 396), or as executrix or administratrix, and in respect of which she is not in the position of a *feme sole* by virtue of section 18 of the Married Women's Property Act, 1882 (*Lumley v. Hutton*, Cro. Jac. 447; 1 Wms. on Exors. 833), they are entirely at the disposal of the husband after marriage, and he may submit

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disputes concerning the same to arbitration, and an award made in the lifetime of the husband will bind the wife after his death. (Com. Dig. "Arb." D. 2.)

Matters touching the freehold property of the wife not limited to her separate use may, by a joint reference of husband and wife, be submitted to arbitration. The submission would not, however, be binding upon the wife unless made by an acknowledged deed. (See *Cahill v. Cahill*, 8 App. Cas. 420; 31 W. R. 861; *Williams v. Walker*, 9 Q. B. D. 576; 31 W. R. 120.)

As in the case of an infant, so in that of a married woman, everyone must be presumed to be aware of her legal disability, and a person who has knowingly entered into a submission with a married woman cannot move to set aside the award on the ground that she is not bound by it. (*Re Warner*, 2 D. & L. 148.)

A married woman may be a party to a submission respecting the adjustment of the terms of her separation from her husband. (See 2 Bright, Husband and Wife, 311.)

Persons acting
under com-
pulsion.

Though a submission by a party acting under threats or imprisonment is generally void, yet if it is afterwards voluntarily acted upon by the party, he taking his chance of a favourable award, he cannot avoid it when the result has turned out to his disadvantage. (*Ormes v. Beadel*, 30 L. J., Ch. 1.)

Partners.

Since a submission to arbitration is no part of the business of a trading concern, one partner cannot, without special authority, bind his co-partners by a submission even of matters connected with or arising out of the business of the firm. (*Stead v. Salt*, 3 Bing. 101; *Adams v. Bankhart*, 1 Cr., M. & R. 681; *Boyd v. Emerson*, 2 A. & E. 184; *Re Aldington*, 15 C. B., N. S. 375; and see Partnership Act, 1890 [53 & 54 Vict. c. 39], s. 6.) The authority need not be in writing, but must be actually given. (*Ball v. Dunsterville*, 4 T. R. 313.) An authoriza-

tion for one partner to sue in the name of himself and the other partner will not be sufficient to empower him, after having brought an action on such authorization, to refer the action and *all matters in difference* so as to bind the other partner. (*Hatton v. Royle*, 27 L. J., Ex. 486; 3 H. & N. 500; see also *Robertson v. Hatton*, 26 L. J., Ex. 293.) If, with knowledge of the submission, co-partners attend the reference, and do not object to it, they will be held to be bound by acquiescence. (*Thomas v. Atherton*, 48 L. J., Ch. 370; 10 Ch. D. 185.)

If a man submit on behalf of himself and his partners he will himself be bound to perform the award. (*Strangford v. Green*, 2 Mod. 228.) Where, however, an individual partner executes a submission on the faith and understanding that it is to be executed by his co-partners, it does not bind him unless the signatures of the rest be procured, as the submission is incomplete. (*Antram v. Chace*, 15 East. 209; see also *Dutton v. Morrison*, 17 Ves. 193; *Johnson v. Baker*, 4 B. & Ald. 440.)

When a person submits on behalf of himself and others jointly interested in the matter in dispute he will be bound, though the others will not. (*Mudy v. Osam*, Litt. 30; *Wood v. Thomson*, Roll. Ab. "Arb." F. 11.) Where parties agree jointly and severally to refer disputes to arbitration, and bind themselves jointly and severally to perform the award, although their interests are several, yet each is liable to the performance of the award, not only as to what is awarded to be performed by himself, but also by his companions. (*Mansell v. Burredge*, 7 T. R. 352; *Genne v. Tinker*, 3 Lev. 24; 2 Byth. 606).

Persons with
joint interests.

Corporations sole or aggregate may submit to arbitration. (Roll. Ab. "Arb." 2, A. 3.) It is a general rule that a corporation, unless otherwise provided by statute, is not bound by any contract not under its common seal. Therefore a submission to reference by a corporation should either be under the common seal of the

Corporations.

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corporation or be entered into in the form and manner directed by the statute which empowers the corporation to contract in some other way.

Executors and trustees.

By the Trustee Act, 1893 (51 & 52 Vict. c. 59), s. 21, it is provided that an executor, or administrator, or two or more trustees acting together, or a sole acting trustee, where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they may think fit, submit to arbitration, or otherwise settle, any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for that purpose may enter into, give, execute, and do such agreements, instruments, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith. The power applies only if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained. The section applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of the Act.

A submission to arbitration of a debt alleged to be due to the deceased is not in itself an admission by the executor or administrator of assets (*Pearson v. Henry*, 5 T. R. 6); though a submission of matters in difference between the deceased and another, without a protest against the reference being taken as an admission of assets, will amount to such an admission, and the executor will be bound to pay any sum awarded. (*Robson v. —*, 2 Rose, 50; *Barry v. Rush*, 1 T. R. 691; *Riddell v. Sutton*, 5 Bing. 200.) He should therefore stipulate against the reference being taken as an admission of assets sufficient to pay what may be the amount of the award. (*Worthington v. Barlow*, 7 T. R. 453; *Love v. Honey-*

bourne, 4 D. & R. 814; *Re Joseph and Webster*, 1 R. & M. 496.) CHAP. II.

It has been held that trustees referring matters connected with their trust to arbitration do not thereby make themselves personally liable. (*Davies v. Ridge*, 3 Esp. 101; *Bristow v. Binns*, 3 D. & R. 184.) The proposition is, however, too broad, and the question of liability should be expressly excluded by the submission. (See *Robson v. —*, *supra*; *Re Wansborough*, 2 Chitt. 40.)

The committee of the estate of a lunatic may, with the permission of the judge in lunacy, refer the lunatic's interests to arbitration. Lunatics.

A bankrupt cannot submit to arbitration so as to affect his estate, but his trustee, with the consent of the committee of inspection, may. (46 & 47 Vict. c. 52, s. 57.) If the submission is made by the trustee without the necessary consent it will not bind the bankrupt's estate, but the trustee will be personally liable under the award. (*Ex parte Wyld*, 30 L. J., Bank. 10; 2 De G., F. & J. 642.) And an agreement by the trustee to submit to arbitration will be deemed an admission of assets to answer the result unless the contrary is expressly provided. (*Robson v. —*, 2 Rose, 50.) Bankrupts.

Though he cannot make a submission binding upon his estate, the submission of a bankrupt is not void, but it will be binding on him personally, and if costs are awarded against him, he may be made to pay them. (*Re Milnes and Robertson*, 24 L. J., C. P. 29; 15 C. B. 451.)

An agent duly authorized may bind his principal by a submission. (*Shelf v. Bailey*, Com. 183; *Adams v. Statham*, 2 Show. 61.) But the agent should make his submission in the name of the principal, otherwise he, and not the principal, will be bound, notwithstanding Agents.

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he may not have any interest in the matter in dispute. (*Bacon v. Dubarry*, 1 Ld. Raym. 246.) As the validity of a submission by an agent depends upon the sufficiency of his authorization, the latter should be carefully attended to. If the submission is under seal, the authorization should be in the same manner. (*Steiglitz v. Egginton*, 1 Holt, N. P. C. 141; *Harrison v. Jackson*, 7 T. R. 207.)

Assignee with
power of
attorney.

Sometimes an authority to an agent to refer arises out of his employment, as in the case of an underwriter (*Goodson v. Brooke*, 4 Camp. 163), or of a consignee of goods. (*Curtis v. Barclay*, 5 B. & C. 141.) So in the case of an assignee of a contract to do certain works, with a power of attorney to take proceedings in the name of the assignor (*Hancock v. Reid*, 21 L. J., Q. B. 78); and of an assignee of debts with a power of attorney to receive and compound for the same. (*Banfill v. Leigh*, 8 T. R. 571.) And a power of attorney to A. to act in the dissolution of a partnership, with authority to appoint any other person as he might see fit, was held to give A. power to submit accounts to arbitration. (*Henley v. Soper*, 8 B. & C. 16; 2 M. & R. 155.)

An agent authorized to refer has the same powers in the conduct of the reference as his principal would have, and may bind his principal by waiving any objections to irregularities in the proceedings. (*Hamilton v. Bankin*, 19 L. J., Ch. 307; 3 De G. & S. 782; *Backhouse v. Taylor*, 20 L. J., Q. B. 233.)

Solicitors.

The solicitor in an action (*Buckle v. Roach*, 1 Chitt. 193; *Cayhill v. Fitzgerald*, 1 Wils. 28, 58), or his town agent (*Griffiths v. Williams*, 1 T. R. 710), but not his confidential clerk (*Greenwood v. Titterington*, 9 A. & E. 699), has power to refer, and can bind his client (*Paul v. Paul*, 2 C. & M. 235; *R. v. Hill*, 7 Price, 636) without any express authorization (*Thomas v. Hewes*, 2 C. & M. 519; *Adams v. Bankart*, 1 C. M. & R. 681; *Ex parte*

Wenham, 21 W. R. 104; *Pristwick v. Policy*, 34 L. J., C. P. 189), and even when the client has expressly desired him not to refer (*Filmer v. Delber*, 3 Taunt. 486; *Smith v. Troup*, 7 C. B. 757; 18 L. J., C. P. 209); and if by referring the solicitor exceed his actual authority, the remedy of the client is against him, but he is still bound by the award. It has been held that a solicitor may also refer together with the cause all matters in difference. (*Dowse v. Coce*, 3 Bing. 20.) He can also consent to an enlargement of time (*R. v. Hill*, 7 Price, 636), or to making an order a rule of court. (*Paull v. Paull*, 2 Dow. 340.) If a solicitor appear for a corporation with the knowledge of the directors he can bind the corporation by an agreement to refer without being authorized to appear by any authority under seal. (*Fariell v. Eastern Counties Rail. Co.*, 2 Ex. 344; 17 L. J., Ex. 297.) A solicitor has no power by a reference to arbitration to bind infant parties suing by their next friend. (*Biddell v. Dowse*, 6 B. & C. 255.)

Though the authority of counsel to refer is a point not free from doubt, and the opinions of the judges have not always been concurrent, it seems that in general a reference by the consent of counsel in a cause will be binding upon the client. (*Furnival v. Bogle*, 4 Russ. 142; *Swinfen v. Swinfen*, 25 L. J., C. P. 303; 18 C. B. 485; *Chambers v. Mason*, 28 L. J., C. P. 10; *Ex parte Wenham*, 21 W. R. 104; *Strauss v. Francis*, 35 L. J., Q. B. 133; L. R., 1 Q. B. 379.) Certainly if the client is present and does not repudiate the authority. (*Rumsey v. King*, 33 L. T. 728; *Holt v. Jesse*, 24 W. R. 879.) But he has no authority over matters collateral to the action. (*Strauss v. Francis*, *supra*; *Swinfen v. Lord Chelmsford*, 29 L. J., Ex. 382.)

Persons incapable of referring to arbitration at common law are often enabled to do so by statute. The most important of the enabling statutes is the L. C. C.

Persons empowered by statute.

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Act, 1845 (8 & 9 Vict. c. 18), by virtue of which persons under disability, or possessing only limited interests in land affected by public undertakings, are empowered to submit to arbitration questions of compensation for the purchase in fee of, or for damage done to, such land.

CHAPTER III.

WHAT MATTERS MAY BE REFERRED TO ARBITRATION.

WHATEVER may be the subject of civil litigation may be referred to arbitration. All disputes between parties, and all actions (Bac. Ab. "Arb." A.),—even an action for breach of trust in charity, but only with the consent of the Attorney-General (*Att.-Gen. v. Fra*, 4 Madd. 274),—may be referred. And an action may be referred at any stage. The parties may even refer to arbitration the question whether a judgment has been properly obtained, whether it has been satisfied, whether it is void, or even whether it is erroneous, and an award might be made that such judgment should be released or satisfied. (*Barry v. Grogan*, 16 W. R. 727; *Roberts v. Mariett*, 2 Wm. Saund. 190.) A stranger to the action, but interested in the subject-matter, may be a party to an order referring the action, and be bound by it. (*Williams v. Lewis*, 7 E. & B. 929.)

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Civil matters
in dispute.

A suit for divorce cannot be referred so as to enable the arbitrator by his award to annul a marriage. The power to do so is vested in the Probate, Divorce, and Admiralty Division of the High Court of Justice only, and no voluntary agreement of husband and wife could confer upon anyone else a like power. But a husband and wife may refer to arbitration the question whether a sufficient cause for separation does or does not exist, instead of applying to the court; and they may bind themselves to abide by the terms of separation awarded by the arbitrator. (*Soilleux v. Herbst*, 2 B. & P. 444; *Bateman v. Ross*, 1 Dow. 235; *Hart v. Hart*, 30 W. R. 8; 18 Ch. D. 670; 50 L. J., Ch. 697; and see *Vansittart v.*

Suits for
divorce.Terms of
separation.

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Vansittart, 27 L. J., Ch. 222; 2 De G. & J. 249; *Besant v. Wood*, 12 Ch. D. 622; 48 L. J., Ch. 497; *Cahill v. Cahill*, L. R., 8 App. Cas. 420.) And where the parties on the eve of trial of a suit by the wife for judicial separation, by reason of cruelty, agreed that the cause should not be moved, and that arbitration should be resorted to, the court refused to allow the petitioner to proceed with the original suit, she having wilfully interposed obstacles to the arbitration. (*Hooper v. Hooper*, 29 L. J., Prob. & M. 59; 30 *ib.* 49; 1 Sw. & Tr. 602.)

Questions of
law and fact.

The decision of bare questions of law or of fact may be referred to arbitration, and the award will be binding, whether right or wrong in point of law. (*Ching v. Ching*, 6 Ves. 282; *Price v. Hollis*, 1 M. & S. 105; *Steff v. Andrews*, 2 Madd. 6.) So may the ascertainment of the amount to be paid to contractors for work done (*Scott v. Liverpool Corporation*, 28 L. J., Ch. 230), or the determination of the price to be paid for the purchase of property. (*Round v. Hatton*, 2 Dow. N. S. 446.) But, as we have previously noticed (*ante*, p. 3), where there have been no "differences" between the parties previous to their submission, and the reference is to a person merely to value or certify a sum due, without conducting any judicial inquiry, it is not strictly a reference to arbitration.

Future
differences.

Parties may agree to refer future differences, though none at present exist (52 & 53 Vict. c. 49, s. 27); and an arbitrator may make a binding award on the parties to a submission as to their future enjoyment of property, or future conduct in relation to the matters in difference. (*Wrightson v. Bywater*, 3 M. & W. 199; *Boodle v. Davies*, 3 A. & E. 200.)

Differences
respecting
wills.

Though a testator may provide that questions respecting his property may be submitted to arbitration by his executors or trustees, he cannot provide that if any differences respecting his will arise they shall be finally

determined by an arbitrator named. (*Philips v. Bury*, Skin. 469; but see 2 Byth. 627, n.) Disputants themselves, however, may refer to arbitration the construction of a will. (*Steph v. Andrews*, 2 Madd. 6.)

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Where the subject-matter is clearly illegal (*Steers v. Lashley*, 6 T. R. 61), or so purely criminal that it cannot under any circumstances be made the subject of a civil action (Bac. Ab. "Arb." A.; *R. v. Bardell*, 5 A. & E. 619; *R. v. Hardey*, 14 Q. B. 529), or is an offence of a public nature for which no private person can recover compensation (*Keir v. Leeman*, 6 Q. B. 308; 13 L. J., Q. B. 359; *Edgcombe v. Rodd*, 5 East, 294; *R. v. Blake-more*, 14 Q. B. 544), it cannot be referred.

Matters illegal or purely criminal not arbitrable.

But matters criminal, for which the injured party has a remedy by action as well as by indictment, may be referred. (*Baker v. Townshend*, 1 Moore, 120; 7 Taunt. 422; *Keir v. Leeman*, *supra*, per Denman, C.J.) And they may be referred, before indictment, by the simple agreement of the parties; but, after an indictment is preferred, it seems the consent of the court in which the indictment is pending should first be obtained. (Watson on Awards, 59; Kyd on Awards, 64; *R. v. Bardell*, 5 A. & E. 619.) The reference may be after as well as before conviction. (*Beeley v. Wingfield*, 11 East, 46.)

What criminal matters may be referred.

Where a company has entered into an agreement which is *ultra vires*, any agreement to refer disputes arising out of it to arbitration is equally *ultra vires*. (*Mannsell v. Midland Gt. Western Rail. Co.*, 1 H. & M. 130; 32 L. J., Ch. 513.)

When a reference is *ultra vires*.

There are many matters, not otherwise referable to arbitration, for which special provisions have been made by statute.

Matters referable by statute.

By 12 & 13 Viet. c. 45, s. 12, all orders, rates, and other matters, in respect of which notice of appeal to the general or quarter sessions of the peace shall have been given, and for which the remedy is by such appeal (not

Matters of appeal at quarter sessions.

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Reference by
the parties.

being a summary conviction or order of bastardy, or any proceedings under the Acts relating to the excise, customs, stamps, taxes, or post office), the parties, by an order of a judge of the Queen's Bench Division, may refer to the arbitration or umpirage of any person or persons, and agree that such submission may be made a rule of court, and the provisions of 9 & 10 Will. 3, c. 15 [now the Arbitration Act, 1889, which has repealed and replaced the earlier statute], shall apply as to the enforcing or setting aside an award or umpirage under the Act, and every award and umpirage under the Act shall be as binding and effectual as if the same had been a regular judgment of the sessions, and may, on the application of either party, be enrolled among the records of the court. This section does not, like section 13, give an express power enabling the superior court to refer the case back again to the arbitrator. The section only applies where the reference is by judge's order, and not where it is by private agreement. (*Leicester Waterworks Co. v. Barrow Union*, 48 L. J., M. C. 41; 4 Q. B. D. 18.)

By the court.

By section 13 of the same Act, after such an appeal has been brought before a court of quarter sessions, such court, with the consent of the parties, may refer it on such terms as the court shall think reasonable. And the order of reference may be made a rule of the Queen's Bench Division, and the award of the arbitrator or the umpirage of the umpire may, on motion by either party at the sessions next or next but one after such award or umpirage shall have been finally made and published, or after the decision of the Queen's Bench Division on any motion for setting aside the same, be entered as the judgment of the court of general or quarter sessions in the appeal, and shall be as binding and effectual as if given by the court. The Queen's Bench Division may refer the matter back to the arbitrator, or set aside the award, and order the court of sessions to enter

continuances, and hear the appeal. Under this section the court of sessions might make an order that the costs should or should not abide the event of the award, or be in the discretion of the arbitrator. (*West London Extension Rail. Co. v. Fulham Union*, 39 L. J., Q. B. 178; L. R., 5 Q. B. 361; *Reg. v. JJ. West Riding*, 34 L. J., M. C. 142.) The award or umpirage having been made, the court of quarter sessions is to be moved, not to make any order respecting it, but to enter it as the judgment of the court. (*Reg. v. JJ. West Riding*, 34 L. J., M. C. 142.) Any application to impeach or remit the award must be to the Queen's Bench Division. The 14th section provides that if, either from the death of the arbitrator or umpire or any other cause, it has become impossible that an award or umpirage can be made, the Queen's Bench Division may order the court of sessions to enter continuances and hear the appeal.

Abortive
reference.

By the L. C. C. Act, 1845 (8 & 9 Vict. c. 18), persons claiming as compensation or purchase money more than 50*l.* (s. 23), in respect of a greater interest than as tenant from year to year (s. 121; *R. v. Manchester, &c. Rail. Co.*, 23 L. T. 287) in lands of which promoters of public undertakings have given notice of their intention to take (s. 18), or which will be, or have been, injuriously affected by the works (ss. 18, 68), may, if they desire to have the claim settled by arbitration, and signify such desire in writing to the promoters before they have issued their warrant to summon a jury, and state the nature of the interest and the amount claimed, have it so settled accordingly (ss. 23, 25—37. See Browne & Allan on Compensation, 62 *et seq.*). Questions as to severed lands (s. 94), as to interests omitted to be included (ss. 124—126), and as to the price of surplus lands (s. 130), may be decided in like manner. As these clauses are incorporated with the Acts of all public undertakings requiring the acquisition of land, they are of extensive

Compensation
under the
L. C. C. Act,
1845.

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practical value. An arbitration under the L. C. C. Act, 1845, settles the amount of compensation only, and not the liability of the parties. If the defendant refuses to pay the amount awarded, on the ground of non-liability, the plaintiff must enforce his claim by action, and not by summons under the Arbitration Act to enforce the award. (*Re Newbold and Metropolitan Rail. Co.*, 14 C. B., N. S. 405; *Beckett v. Midland Rail. Co.*, L. R., 1 C. P. 241; 35 L. J., C. P. 163; *Brandon v. Brandon*, 34 L. J., Ch. 333; 2 Dr. & Sm. 305.)

Compensation, &c.,
under R.C.C.
Act, 1845.

By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20, s. 44), compensation for land taken or used for the purpose of any railway, or injuriously affected by its construction, and for damages in respect of such land, are to be ascertained in the manner provided by the L. C. C. Act, 1845. The Railways Clauses Act, 1845, also provides for certain matters therein mentioned, such as the compensation to be paid for injury done to mines not taken by the company (s. 81), or differences respecting the fitness of engines (s. 115) or construction of carriages (s. 117) of strangers intended to be run upon the line of the company being referred to arbitration under provisions contained in the Act (ss. 126—137; Browne & Allan on Compensation, 371 *et seq.*).

Light Rail-
ways Act,
1896.

By the Light Railways Act, 1896 (59 & 60 Vict. c. 48, s. 13), where any order under the Act incorporates the Lands Clauses Acts, any matter which under those Acts might be determined by a jury, arbitration, or justices, shall be determined by a single arbitrator appointed by the parties, or, if they cannot agree, by the Board of Trade.

Under Com-
panies Clauses
Act, 1845.

Disputes authorized by any Act incorporating the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), to be settled by arbitration, may be so settled in accordance with the provisions contained in that Act (ss. 128—134).

By the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), railway companies are empowered to refer to arbitration matters in which they are mutually interested, and which they might lawfully settle amongst themselves (s. 2). And the Act contains detailed provisions as to the mode of carrying out the reference. By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), where any difference between railway and canal companies is, under the provisions of any general or special Act, required or authorized to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the Railway Commissioners, be referred to the Commissioners for their decision instead of being referred to arbitration (s. 8). This does not apply where there is an agreement between the parties by which they stipulate for a particular mode of reference, but only where the arbitration is imposed upon the parties by statute (*Great Western Rail. Co. v. Waterford and Limerick Rail. Co.*, 50 L. J., Ch. 513; 17 Ch. D. 493; *Halesowen Rail. Co. v. Great Western Rail. Co.*, 48 L. T. 710; 52 L. J., Q. B. 473); nor does it apply where there is an agreement to refer which is afterwards scheduled to a private Act and confirmed. (*Reg. v. Midland Rail. Co.*, 19 Q. B. D. 540; 56 L. J., Q. B. 585.) By the Board of Trade Arbitration, &c., Act, 1874 (37 & 38 Vict. c. 40), differences between railway and canal companies required or authorized under the provisions of any general or special Act to be referred to the Board of Trade, or some person appointed by the Board of Trade, may, by order under the hand of the president or one of the secretaries of the Board, be referred to the Railway Commissioners (s. 6). This does not apply to the appointment of an umpire under section 28 of the L. C. C. Act, 1845.

By the Companies Act, 1862 (25 & 26 Vict. c. 89), The Companies Act, 1862. companies governed by that Act are empowered to refer

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Differences
between rail-
way com-
panies.

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disputes with other companies or persons to arbitration, in accordance with the Railway Companies Arbitration Act, 1859 (ss. 72, 73). In the case of a voluntary winding up of a company the liquidator may, with the sanction of a special resolution, transfer the business of the company to another company, in consideration of shares, &c., in such other company; but before carrying such resolution into effect the liquidator must purchase the interest of any dissentient member (s. 161), the price of such interest, in case the parties differ, to be settled by arbitration; and for the purposes of such arbitration the provisions of the L. C. C. Act, 1845, shall apply (s. 162; *Re Mysore West Gold Mining Co.*, 42 Ch. D. 535; 61 L. T. 453), unless the articles of association contain provisions for arbitration. (*De Rosaz v. Anglo-Italian Bank*, 38 L. J., Q. B. 161; L. R., 4 Q. B. 462.)

The Tram-
ways Act,
1870.

Under the Tramways Act, 1870 (33 & 34 Vict. c. 78), differences between the promoters or lessees of a tramway, on the one hand, and any local authority or road authority, or any gas or water company, or any company, body, or person to whom any sewer, drain, tube, wires, or apparatus for telegraphic or other purposes may belong, or any other company, on the other hand, with respect to any interference or control exercised or claimed to be exercised in relation to any tramway or work, or the mode of executing any work, or the amount of compensation, or with respect to any other thing regulated by or comprised in the Act, shall (unless by the Act otherwise provided) be settled by a person nominated as referee by the Board of Trade, and the costs of the reference paid as the referee directs (s. 33; *Reg. v. Croydon and Norwood Tramways Co.*, 18 Q. B. D. 39; 56 L. J., Q. B. 125; *Bristol Trams and Carriage Co. v. Mayor of Bristol*, 25 Q. B. D. 427; 63 L. T. 177).

The Public
Health Act,
1875.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), provides by section 308 that, where any person sustains

any damage by reason of the exercise of any of the powers of the Act (*Burgess v. Northwich Local Board*, 50 L. J., C. P. 219; 6 Q. B. D. 264; *Lumley, Public Health*, 402) in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by sections 179—181 of the Act, unless the compensation claimed does not exceed 20*l.*, when the same may, at the option of either party, be ascertained before a court of summary jurisdiction.

This does not apply where land is taken compulsorily, in which case the compensation is to be settled according to the provisions of the L. C. C. Act, 1845 (s. 176; *Ex parte Rayner*, 3 Q. B. D. 446; 47 L. J., Q. B. 660).

The arbitrator under this Act, like an arbitrator under the L. C. C. Act, 1845 (*ante*, p. 26), can only settle the amount of compensation, and cannot determine the liability of the local authority. (*The Queen v. Metropolitan Commissioners of Sewers*, 22 L. J., Q. B. 234; 1 E. & B. 694; *Re Bradby*, 24 L. J., Q. B. 239.) But a person who claims compensation is entitled to have the amount determined by arbitration, notwithstanding the authority deny their liability, the determination of the question of liability not being a condition precedent to the arbitration; the local authority must raise the question of liability in their defence to an action on the award. (*Brierley Hill Local Board v. Pearsall*, 9 App. Cas. 595; 54 L. J., Q. B. 25; *Bradford Local Board v. Hopwood*, 6 W. R. 818.)

Under section 150 of the Act, it may be referred to arbitration to fix the proportion of paving expenses payable by an owner of premises to the local authority. But the award is only enforceable by summary

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proceedings in the manner pointed out by that section. (*Re Willesden Local Board and Wright* [1896] 2 Q. B. 412 ; 44 W. R. 676.)

The Allotments Act, 1887.

The Allotments Act, 1887 (50 & 51 Vict. c. 48), enables sanitary authorities to acquire land for allotments, and provides that any question of disputed compensation shall be referred to a single arbitrator appointed by the parties, or, in case they do not agree, by the Local Government Board (s. 3, sub-s. 4).

Local Government Act, 1888.

Under the Local Government Act, 1888 (51 & 52 Vict. c. 41), questions between a county council and an urban authority as to the annual sum to be paid by the former to the latter towards the maintenance of main roads, or between a county council and a district council as to the sum to be paid for such maintenance (s. 11, sub-ss. 3, 4, 9), may be determined by the Local Government Board, either as arbitrators or otherwise, at the option of the Board (59 & 60 Vict. c. 9, s. 1) ; while other questions between a county council and local authorities are to be decided by the Board as arbitrators pursuant to the provisions of the Regulation of Railways Act, 1868. (51 & 52 Vict. c. 41, s. 63 ; *Re County Council of Kent and Sandgate Local Board* [1895] 2 Q. B. 43.)

Lunacy Act, 1890.

The Lunacy Act, 1890 (53 Vict. c. 5), provides for arrangements between county councils and borough councils as to the cost of a county asylum being settled by arbitration under the Local Government Act, 1888 (s. 244).

Coal Mines Regulation Act, 1887.

By section 42 of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), if any inspector find a mine or any part thereof, or any matter, thing, or practice in or connected with such mine, to be dangerous or defective so as to threaten or tend to the bodily injury of any person, he may give notice thereof in writing to the owner, stating the particulars in respect of which he considers it defective, and requiring the same to be remedied. If

the owner objects to remedy the matter he may send his objection in writing to a Secretary of State, and thereupon the matter shall be determined by arbitration, as provided in section 47. (*Re Secretary of State for Home Department and Fletcher*, 18 Q. B. D. 339; 56 L. J., Q. B. 177.) A later Act makes provision for the workmen being represented at such arbitration. (59 & 60 Vict. c. 43, s. 2.)

Many of the Acts affecting only the Metropolis contain provisions as to arbitration. The Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), provides that the amount of compensation to be made under that Act by the Metropolitan Board or any vestry or district board shall, if the compensation claimed exceed 50*l.*, be settled by arbitration in accordance with the provisions of the L. C. C. Act, 1845 (s. 225). The London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), provides that where disputes arise between a building owner and an adjoining owner as to the right to do and the time and manner of doing any work contemplated by the building owner, unless the parties concur in selecting one surveyor, they are each to appoint one, and those two appoint a third, and such one surveyor or three surveyors, or any two of them, shall settle the matter in dispute (s. 91). The Act also provides for reference of differences between the County Council and the owner of a dangerous structure (s. 107). The Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), provides for the settlement of disputes between a local authority and the gas company, as to the alteration in the test or the rate to be charged for lighting any public lamp, by arbitration under the Companies Clauses Consolidation Act, 1845 (s. 38). The Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), enables disputes in relation to the execution of that Act to be determined by arbitration under the Companies Clauses Consolidation Act, 1845 (s. 43).

The Metro-
politan Acts.

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Housing of
Working
Classes Act,
1890.

The several Acts for providing better habitations for the working classes have been consolidated in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), which enables a local authority to prepare a scheme for the improvement of areas, including groups of streets and houses, and to purchase the land required for the scheme, the compensation to be paid for such land to be settled by an arbitrator to be appointed and removable by the Local Government Board (s. 41, schedule 2). An arbitrator under this Act can only assess the amount of compensation, and has no power to decide the question of the right to compensation. (*Wilkins v. Mayor, &c., of Birmingham*, 25 Ch. D. 78; 32 W. R. 118; 49 L. T. 468; 53 L. J., Ch. 93.)

Building
societies.

The Building Societies Act, 1874 (37 & 38 Vict. c. 42), provides (s. 16) that the rules of each society shall set forth whether *disputes* between the society and any of its members shall be settled by reference to the county court, to the Registrar of Friendly Societies, or to arbitration, and enacts (s. 34) that where the rules of a society direct disputes to be referred to arbitration, arbitrators shall be named and elected in the manner such rules provide, or, if there be no such provision, at the first general meeting of the society, none of the said arbitrators being beneficially interested, directly or indirectly, in its funds; of whom a certain number, not less than three, shall be chosen by ballot in each such case of dispute, the number of the said arbitrators and mode of ballot being determined by the rules of the society. (And see s. 36.)

In the case of the *Municipal Building Society v. Kent* (9 App. Cas. 260; 53 L. J., Q. B. 290) the House of Lords decided that "disputes" was not restricted to disputes between the society and a member in his capacity as member, but extended to disputes and claims between the society and a member in his capacity of mortgagor of

the society, so that the society could not enforce their security against a mortgagor member by action on the covenant, but only by sale. In consequence the Building Societies Act, 1884 (47 & 48 Vict. c. 41), was passed, which, by section 2, enacted that "the word disputes in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled." (*Western Suburban, &c. Building Society v. Martin*, 17 Q. B. D. 609; 55 L. J., Q. B. 382.) A claim by a society against one of its officers, for misappropriating moneys, is not a dispute with him "in his capacity of a member." (*Municipal Building Society v. Richards*, 39 Ch. D. 372; 58 L. J., Ch. 8.) A member who has given notice of withdrawal remains a member for the purpose of a reference to arbitration. (*Darves v. Second Chatham, &c. Building Society*, 61 L. T. 680; *Walker v. General Mutual, &c. Building Society*, 36 Ch. D. 777; 57 L. T. 574.)

The arbitrators may be appointed by the society after the dispute has arisen. (*Norton v. Counties, &c. Building Society* [1895] 1 Q. B. 246; 43 W. R. 178 overruling *Christie v. Northern Counties, &c. Building Society*, 43 Ch. D. 62; 61 L. T. 796.) And the effect of a rule

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that disputes between the society and its members shall be settled by arbitration ousts the jurisdiction of the court with reference to such disputes. (*Ib.*; *Wright v. Monarch Investment Building Society*, 5 Ch. D. 726; 46 L. J., Ch. 649; *Hack v. London Provident Building Society*, 52 L. J., Ch. 541; 23 Ch. D. 103; *Municipal Building Society v. Kent*, 9 App. Cas. 260; *Johnson v. Altrincham Building Society*, 49 L. T. 568.) The Act of 1874 does not apply to societies established under the old Act (6 & 7 Will. 4, c. 32), and not having obtained a certificate of incorporation under the Act of 1874 (*Mulkern v. Lord*, 4 App. Cas. 182; 48 L. J., Ch. 745), and a rule of such a society for reference to arbitration does not apply to disputes involving the adjustment of rights created by a mortgage. (*Ib.*; *Buckle v. Lordonny*, 56 L. J., Ch. 437; 56 L. T. 273.) In any case the arbitrators have only power to determine disputes between a society and its members, and they have no power to determine a disputed question as to whether or not a person is a member. (*Prentice v. London*, 44 L. J., C. P. 353; L. R., 10 C. P. 679.)

The High Court of Justice has no jurisdiction either to enforce or set aside the award. The Act (37 & 38 Vict. c. 42), provides that whatever award shall be made by the arbitrators, or the major part of them, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the court (which means the county court of the district in which the chief office of the society is situate) (s. 4), upon proof of such award having been made, and of the refusal of the party to comply therewith, shall enforce compliance with the same upon the petition of any person concerned (s. 34). Every determination by arbitrators of a dispute shall be binding and conclusive on all parties, and shall be final to all intents and

purposes, and shall not be subject to appeal, and shall not be removable into any court of law or restrained by injunction; but the arbitrators may state a case for the opinion of the High Court on any question of law (s. 36); though under the Building Societies Act, 1894, it is not obligatory upon them to do so (57 & 58 Vict. c. 47, s. 20).

By the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), which consolidates the previous Acts, disputes shall be decided either (1) in the manner directed by the rules of the society, and the decision shall be binding and conclusive, and application for enforcement may be made to the county court (2) by consent, unless the rules forbid it, by the Registrar of Friendly Societies, or (3), when the rules so direct, by justices, or, if the parties consent, by the county court (s. 68; and see *Bache v. Billingham* [1894] 1 Q. B. 107; 63 L. J., M. C. 1). The Act does not apply to disputes as to the title of a person claiming to be a member of the society. (*Willis v. Wells* [1892] 2 Q. B. 225; 61 L. J., Q. B. 606; *Palliser v. Dale* [1897] 1 Q. B. 257.)

Friendly societies.

By virtue of 26 & 27 Vict. c. 87, s. 48, and 39 & 40 Vict. c. 52, s. 12, all disputes between the trustees and managers of any savings bank, on the one hand, and any depositor or person claiming through or under a depositor, on the other hand, are to be settled by a reference to the Registrar of Friendly Societies, whose award is final and without appeal. The jurisdiction here given to the registrar ousts the jurisdiction of the courts. (*Crisp v. Bunbury*, 8 Bing. 394.)

Savings banks.

Under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), an agricultural tenant's claims for compensation for improvements, disputed questions as to the value of fixtures removable by the tenant, and the reduction of rent to be allowed to a tenant in respect of land resumed by the landlord, are to be settled by arbitration. (See *Redman's Landlord and Tenant*, 421 *et seq.*) Under

The Agricultural Holdings Act, 1883.

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the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), compensation to the tenants of allotments for crops, fruit trees, labour, manure, and structural improvements may be ascertained by arbitration (s. 7; Redman, L. & T., 426); while the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), enables a market gardener to make the improvements therein mentioned and claim compensation under the provisions of the Agricultural Holdings Act, 1883.

Workmen's
Compensa-
tion Act,
1897.

Under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37) which commences on the 1st July, 1898 (s. 10), if in any employment mentioned in section 7 personal injury by accident arising out of and in the course of his employment is caused to a workman, his employer is liable to pay compensation in accordance with the first schedule to the Act (s. 1). If any question arises in any proceedings under the Act as to the liability to pay compensation under the Act (including any question as to whether the employment is one to which the Act applies), or as to the amount or duration of compensation under the Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to the Act, be settled by arbitration, in accordance with the second schedule to the Act (s. 2. sub-s. 3). The second schedule is set out at length in the Appendix, Part II.

A number of statutes of less general importance provide for the reference of special disputes, but these it is not proposed to notice in detail.

CHAPTER IV.

THE ARBITRATION ACT, 1889.

SECT. 1.—*General Effect of the Act.*

CONSIDERABLE alteration in the law has been effected by the Arbitration Act, 1889 (52 & 53 Viet. c. 49), rendering obsolete a great deal of the previous learning upon the subject. It is, however, a statute of practice, and does not otherwise affect the rules of law applicable to arbitrations or awards. Its aim was to furnish a more simple code of procedure applicable to all submissions.

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Scope of the Act.

In the first place it provides a common form of submission containing most of the usual terms hitherto inserted in formal submissions (s. 2), and which, in the absence of contrary intention in the submission, are to be implied in all references taking place after the commencement of the Act. (*Ante*, p. 8.)

Provides common form of submission.

It abolishes the troublesome formality of making a submission a rule of court—a step hitherto necessary before any application could be made to set aside or enforce the award—and enacts that a submission shall have the same effect as if it had been made an order of court (s. 1).

Dispenses with rules of court.

It simplifies the procedure in applications to the court, since applications of every description, save one, may be made to the "court or a judge," and, by virtue of section 21 of the Act and R. S. C. Order LIV, r. 12a, this jurisdiction may be exercised by a master upon a summons. The exception is section 11, whereby the powers to remove an

Simplifies applications to the court.

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arbitrator or set aside an award can be exercised by the court alone, upon motion.

Attendance of witnesses.

It has substituted the summoning of witnesses by subpœna instead of by an order for attendance (s. 8), and enables the court or a judge to order a writ of subpœna to issue to compel the attendance of a witness wherever he may be within the United Kingdom (s. 18). This power only existed previously in the case of a reference of an action. (*Hall v. Brand*, 12 Q. B. D. 39.)

Correction of clerical error.

It enables an arbitrator to correct a mere clerical error without the necessity of an application to the court (s. 7, sub-s. (c)), thus abrogating *Mordue v. Palmer*. (L. R., 6 Ch. 22 ; 40 L. J., Ch. 8.)

Repeal.

It repeals (s. 26, and see second schedule) all the general statutes as to arbitration, that is to say:—9 Will. 3, c. 15 ; 3 & 4 Will. 4, c. 42, ss. 39—41 ; 17 & 18 Vict. c. 125 (C. L. P. Act, 1854), ss. 3—17 ; 36 & 37 Vict. c. 66, s. 56 in part and ss. 57—59 ; and 47 & 48 Vict. c. 61, ss. 9—11.

Consolidates and amends.

Except so far as amended, or rendered obsolete by the alteration in procedure, the repealed statutes, particularly the three last, are re-enacted in substance. It is to be borne in mind, however, that it is an amending, and not merely a consolidating, statute. (*Hurlbatt v. Barnett*, [1893] 1 Q. B. 77, 79 ; 62 L. J., Q. B. 1.) While, therefore, any part of the repealed statutes which are re-enacted in the same terms are to be construed in accordance with the interpretation put upon the previous Acts (*Re Keighley Maxsted & Co. and Durant* [1893] 1 Q. B. 405, 409 ; 62 L. J., Q. B. 105), yet, where larger words are used in the amending Act, the courts will assume that the intention was to give to the altered language a wider meaning. (*Hurlbatt v. Barnett*, *supra*.)

Applicable to all arbitrations.

Above all, the Act was intended to provide a uniform code of procedure applicable to arbitrations taking place after the 1st of January, 1890. (*Re Williams and Stepney*

[1891] 2 Q. B. 257.) Accordingly, section 24 enacts that "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act."

The test of whether or not there is an inconsistency is whether the provisions of this Act can be read into the other Act regulating the arbitration without any conflict between them. (*Tabernacle Permanent Building Society v. Knight* 1892 A. C. 298, 306; 62 L. J., Q. B. 50; *Re Knight and Tabernacle Permanent Building Society* 1891] 2 Q. B. 63; 60 L. J., Q. B. 633.)

The effect of the section is merely to apply the arbitration provisions of the Act to arbitrations under other Acts, and not to introduce any of the provisions for arbitration contained in the special Act into references made under the provisions of the Arbitration Act, and which might have been, but are not, made under the special Act. (*Zelma Gold Mining Co. v. Hoskins* 1895] A. C. 100, 103; 64 L. J., P. C. 45.) Nor does the Act give the court any jurisdiction in references under special statutes which it did not possess before. (*Re Gollings and Tradesmen's Friendly Society*, 64 L. T. 775.)

Amongst the earlier important Acts to which the Arbitration Act, 1889, may be deemed to apply are the Lands Clauses Act, 1845, the Railways Clauses Act, 1845, the Public Health Act, 1875 (but not under s. 150, *Re Willesden Local Board and Wright* 1896] 2 Q. B. 412), and the Agricultural Holdings Act, 1883.

Some Acts passed since the Arbitration Act, 1889, and containing provisions for arbitration, enact that the Arbitration Act, 1889, shall apply; as, for example, the Stannaries Court Abolition Act, 1896 (59 & 60 Vict. c. 45, s. 4), and the Light Railways Act, 1896 (59 & 60 Vict.

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c. 48, s. 13); some that the Act shall not apply, as in the case of the Conciliation Act, 1896 (59 & 60 Vict. c. 30, s. 3), and the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37, sched. 2, cl. (4)); some that certain provisions of the Act shall not apply, as in the case of the Building Societies Act, 1894 (57 & 58 Vict. c. 47, s. 20), and the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, s. 68), which respectively provide that arbitrators shall not be compelled to state a special case; while other Acts are silent, and thus incorporate the Act in its integrity.

Crown bound
by the Act.

Another alteration made by the Act is to extend its provisions to the Crown. Section 23 enacts:—"This Act shall, except as in this Act expressly mentioned, apply to an arbitration to which Her Majesty the Queen, either in right of the Crown or of the Duchy of Lancaster, or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer, without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown."

SECT. 2.—*Operation of Act in giving Submission the effect of an Order of Court.*

Submission
"same effect"
as order of
court.

The most far-reaching alteration made by the Act is that effected by section 1, that a submission "shall have the same effect in all respects as if it had been made an order of court."

Previous law.

To understand clearly the simplification of the law introduced by this section it is necessary to state shortly the law as it existed before the Act. Originally an agreement to refer stood on no different basis to

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that of any other contract. Neither of the parties could invoke the aid of the court to carry out the reference, or enforce or impeach the award, or question the conduct of the arbitrator, otherwise than by an action at law or suit in equity. A practice arose first in the time of Charles II. of making a submission a rule of court, so as to render any misconduct under that submission, or any refusal to act on the award, a contempt of that court, and so give the particular court jurisdiction over the award and the parties to the submission. (*Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 Ex. 230; 39 L. J., Ex. 130; Kyd on Awards 21; Watson on Awards 46.)

Origin of
making sub-
mission rule
of court.

This practice was only allowed in the first instance in cases in which a suit in court was referred. But experience having shown that the practice contributed to the determination of controversies, it was extended to submissions out of court by 9 & 10 Will. 3, c. 15, s. 1, which enacted that persons desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, may by arbitration agree that their submission of their suit to the award or umpirage of any person shall be made a rule of any of His Majesty's courts of record, and insert the agreement in the submission, which may, on affidavit of the witnesses thereto, be made a rule of court and enforced by the usual means. Under this statute, and prior to the C. L. P. Act, 1854, it was necessary to insert in the submission the consent clause for making it a rule of court, otherwise it could not be so made, and the person refusing to perform the award could not be proceeded against by attachment.

9 & 10 Will. 3,
c. 15, s. 1.

This was followed by the C. L. P. Act, 1854, s. 17, which provides as follows: "Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a

17 & 18 Vict.
c. 125, s. 17.

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rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts it may be made a rule of that court only; and if, when there is no such provision, a case be stated in the award for the opinion of one of the superior courts, and such court be specified in the award, and the document authorizing the reference have not before the publication of the award to the parties been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior courts no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

Both these statutes are now repealed, and a submission can no longer be made a rule of court, except it is under a statute containing a special provision that the submission may be made a rule of court, such as the Lands Clauses Act, 1845.

But it is in no case necessary to make a submission a rule of court, for, under section 1 of the Arbitration Act, 1889, the submission having the effect of an order of court, the award, immediately upon being made, can be either summarily enforced or steps may be taken to set it aside.

Under neither of the repealed Acts could a submission which was not in writing, be made a rule of court, and it is to be observed that the Arbitration Act, 1889, applies only to a "submission" defined as "a written agreement." (*Ante*, p. 2.)

In practice agreements to refer consist of two kinds, namely, submissions of existing differences to named arbitrators, and general agreements to refer under which arbitrators are named when differences arise. An agreement to refer is not strictly a submission until the arbitrator is named, and under the repealed Acts both the agreement to refer and the appointment of arbitrator must have been in writing, otherwise the submission could not be made a rule of court. And, where two persons agreed by deed to refer all matters in dispute which should arise between them to two arbitrators, one to be chosen by each party, and on disputes arising arbitrators were appointed by parol, it was held that the submission was by parol, and could not be made a rule of court. (*Ex parte Glaysher*, 3 H. & C. 442; 34 L. J., Ex. 41.) But it was sufficient if the arbitrators were appointed in writing after the dispute arose (*Re Wilcox and Storkey*, L. R., 1 C. P. 671), and where one of the parties to the deed had appointed an arbitrator *in writing*, and, on the other party making default in appointing a second arbitrator, the arbitrator so appointed proceeded with the inquiry and made his award, the submission was allowed to be made a rule of court. (*Newton v. Hetherington*, 19 C. B., N. S. 342; 13 W. R. 863.)

The combined operation of sections 1 and 27 of the Act of 1889, however, is to give the effect of an order of court to a written agreement to refer future differences whether an arbitrator is named or not. It would seem, therefore, that an award under a written submission and a parol appointment of arbitrators could be enforced as an order of court. But not in the case of a statute requiring the appointments to be in writing. (*Re Gifford and Bury Town Council*, 20 Q. B. D. 368; 57 L. J., Q. B. 181.) Moreover, at law, and apart from the special definition of this Act, a complete submission includes the appointment of the arbitrator, and if the arbitrator is

CHAP. IV.

appointed by parol the submission is by parol, so far as it is to be treated as an ordinary contract between the parties. It is therefore inexpedient in any case to make a verbal appointment of arbitrators.

Meaning of
“same effect
as an order of
court.”

The meaning of the words “same effect in all respects as if it had been made an order of court” is that, whether the submission be a general agreement to refer or not, it is to have the same effect as would have been given to it before the statute by an act of the parties making it a rule of court and no more. (*Re Smith and Nelson*, 25 Q. B. D. 554; 59 L. J., Q. B. 533.) Therefore, the court cannot grant an attachment because one of the parties to the submission refuses to nominate an arbitrator. (*Ib.*) Neither is a submission a “proceeding in the court” so as to give jurisdiction to order the issue of a commission for the examination of witnesses abroad. (*Re Shaw and Ronaldson* [1892] 1 Q. B. 91; 61 L. J., Q. B. 141.)

CHAPTER V.

MODE OF SUBMISSION.

CHAP. V.

A SUBMISSION to arbitration may be :—

1. By mutual agreement between the parties ;
2. By order of reference by consent ;
3. By compulsory order of reference ; or
4. In the manner prescribed by particular statutes.

The Arbitration Act, 1889, distinguishes them as, references by consent out of court, and references under order of court.

SECT. 1.—*Submission by Mutual Agreement.*

In all cases, whether an action be pending or not, parties may submit their disputes to arbitration by any agreement between themselves clearly expressing an intention to make the decision of the arbitrator conclusive.

In what cases parties may agree to submit.

Submissions by agreement may be either (1) by parol, (2) by writing not under seal, (3) by mutual bonds conditioned for the performance of the award, or (4) by indenture ; and may be contained in a formal agreement of submission or in a clause collateral to the principal objects of an instrument. It is prudent that the submission should be executed by all the parties (*Antram v. Chace*, 15 East, 209), though not in every case absolutely necessary. (*Aute*, p. 2.)

In what manner.

If parties in court or in chambers consent to be bound by the decision of a judge his decision is good and final as an award. (*Harrison v. Wright*, 13 M. & W. 816.) And where differences have arisen in a winding up

To a judge as arbitrator.

CHAP. V.

between persons claiming a charge upon a company's estate and the official liquidator the parties agreed that their rights should be determined in a summary way by the judge acting in the matter of the winding up, it was held that this was a submission to the judge personally as an arbitrator, and there was no appeal from his decision as an arbitrator. (*Re Durham Building Society, Ex parte Wilson*, 41 L. J., Ch. 164; L. R., 7 Ch. 45; and see *Elvin v. Drummond*, 4 Bing. 416.)

To an official referee.

Parties may agree to refer to an official referee, and apparently select the one to deal with the reference. "Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred." (52 & 53 Vict. c. 49, s. 3.)

Submission and award constitute a contract;

A submission is merely a contract between the parties of which some of the terms are left to be supplied by the award. (See *Lang v. Brown*, 25 L. T. 297 [H. L.], *per* Lord Cranworth.) The submission and award together constitute a complete contract. (*Wood v. Griffith*, 1 Swanst. 43.)

character of which is determined by submission

The nature of the submission, not the award, determines the character of the contract. Thus, a parol submission and a written award only constitute a parol contract, and a submission not under seal with an award under seal do not make a sum awarded a specialty debt. (*Talbot v. Earl of Shrewsbury*, L. R., 16 Eq. 26; 21 W. R. 473.)

Parol submission.

A parol submission, though perfectly valid, is attended with many disadvantages, since the Arbitration Act, 1889, only applies to submissions in writing. (*Ante*, p. 42; *Ansell v. Evans*, 7 T. R. 1; *Godfrey v. Wade*, 6 Moore, 488; *Ex parte Glaysher*, 34 L. J., Ex. 41.) And, apart from the difficulty of proving the terms of a verbal contract in case of dispute, it is often ineffectual to accomplish

the objects of the reference, for if the subject-matter of reference is any interest in land, an award founded on a parol submission cannot be enforced, as there is no written contract to satisfy section 4 of the Statute of Frauds. (*Walters v. Morgan*, 2 Cox, 369; *Rainforth v. Hamer*, 25 L. T. 247.)

Where the reference involves differences relative to an act to be perfected by deed the submission should be by deed. Thus, where it is agreed that a partnership shall be dissolved by deed, a submission to arbitration respecting partnership differences should be under seal to make an award dissolving the partnership valid. (*Hutchinson v. Whitfield*, Hayes (Ir. Ex.), 78.)

When a submission under seal is necessary.

It is no objection to a submission that one party is bound by deed and the other by simple contract, as in a reference between a private individual and a corporation, which the former only signs, but to which the seal of the latter is affixed. (*Tomlin v. Mayor of Fordwich*, 5 A. & E. 147.)

Submission by deed which one party executes and the other only signs.

No stamp is necessary on an agreement to refer, the subject-matter whereof is not of the value of 5*l.* (54 & 55 Vict. c. 39, schedule; and see *Lloyd v. Mansel*, 19 L. J., Q. B. 192.) But whenever the reference is of "all matters in difference" the agreement should be stamped, since it cannot be surely known that the matter will not be above the value of 5*l.* If a stamp is necessary, and the submission is by an agreement not under seal, it will require a 6*d.* stamp; if by bond, a bond stamp; if by deed, a 10*s.* stamp.

Stamps.

Where several persons having separate interests in the same subject-matter enter into an agreement to refer that matter, the agreement and award require each but one stamp. (*Goodson v. Forbes*, 6 Taunt. 171.) Any agreement by which the parties alter the submission (even if only to enlarge the time) must be stamped as a new agreement. (*Stephens v. Lowe*, 9 Bing. 32.)

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Arbitration no
bar to legal
proceedings.

A submission to arbitration will not bar legal proceedings, and even the commencement and actual pendency of an arbitration respecting a right of action is no answer, before an award is made, to an action in respect of the same matter (*Harris v. Reynolds*, 7 Q. B. 71; *Livingston v. Ralli*, 24 L. J., Q. B. 269),—not even upon equitable grounds. (*Wood v. Copper Miners' Co.*, 17 C. B. 561; 25 L. J., C. P. 166; *Nichols v. Charlie*, 14 Ves. 265; *Cooke v. Cooke*, L. R., 4 Eq. 77; 36 L. J., Ch. 480.) The effect of a stipulation in a submission, in which the arbitrators are named, that no proceedings in law or equity shall be brought in respect of the matters agreed to be referred, is a point not free from doubt. Lord Kenyon and Lord St. Leonards have respectively (*Halfhide v. Fenning*, 2 Bro. C. C. 336; *Dimsdale v. Robertson*, 2 J. & Lat. 58) allowed such an agreement as a bar to proceedings contrary thereto; and though the latter decision has been adversely commented upon (*Scott v. Corporation of Liverpool*, 3 De G. & J. 334; 28 L. J., Ch. 230), it has not been expressly overruled, and was in some degree assented to by Wood, V.-C., in *Cooke v. Cooke* (L. R., 4 Eq. 77), who observed that the question remains *in dubio*. But it is not possible to reconcile the two former cases with the decision in *Lee v. Page* (30 L. J., Ch. 857), and until they are confirmed by some other court they must be regarded as very doubtful law. The point is now, however, one of very little importance, since, even in the absence of a covenant not to sue, the court will generally, upon application stay any proceedings brought in respect of matters agreed to be referred. (52 & 53 Vict. c. 49, s. 4; *post*, p. 53.)

Proceedings
stayed.

Specific performance of an agreement to refer not enforced.

The court will not enforce specific performance of an agreement to refer present or future differences to arbitration. (*Re Smith and Nelson*, 25 Q. B. 545; 59 L. J., Q. B. 533; *Agar v. Macklew*, 2 S. & S. 418; *Street v.*

Rigby, 6 Ves. 818; *Gourlay v. Duke of Somerset*, 19 Ves. 429; *South Wales Rail. Co. v. Wythes*, 5 De G., M. & G. 880.) But the same result is usually attainable by an order, under section 4 of the Arbitration Act, 1889, for a stay of proceedings where an action is commenced in respect of matters agreed to be referred. (*Post*, p. 53; *Fry*, 703.)

A person will be liable to an action for breach of contract if he refuse to enter into an arbitration after having agreed to do so. (*Livingston v. Ralli*, 24 L. J., Q. B. 269; 5 E. & B. 132; *Webb v. Taylor*, 1 D. & L. 676.) But if he appoint an arbitrator he will not be liable to an action, though the arbitrator refuse to act. (*Cooper v. Shuttleworth*, 25 L. J., Ex. 114.) And before a person can succeed in such an action he must show that he had himself engaged to be bound by the award (*Kingston v. Phelps*, Peake, 299), and that the submission is binding on all the other parties to it. (See *Biddell v. Dorse*, 6 B. & C. 255; *Antram v. Chace*, 15 East, 209.)

Action for breach of contract to refer.

When two or more parties enter into a contract agreeing upon some of the terms, but leaving others to be ascertained by arbitration, and the terms to be so ascertained are an essential part of the contract, the court will not order payment, or direct specific performance, if from any cause the arbitrators fail to determine the matter so left to their decision. (*Tillett v. Charing Cross Bridge Co.*, 28 L. J., Ch. 863; 26 Beav. 419; *Darbey v. Whitaker*, 4 Drew. 134; 5 W. R. 772; *Fry*, 152, 158.) Thus the price is an essential ingredient in a contract for sale and purchase, and where the price is to be fixed by valuers who do not agree (*Milnes v. Gery*, 14 Ves. 400), or by valuers, one to be appointed by each party, and the one party refuses to make a proper appointment (*Wilks v. Davis*, 3 Mer. 507), or, having appointed, instructs his valuer not to proceed (*Vickers v. Vickers*, 36 L. J., Ch. 946; L. R.,

Contract conditional upon an award—effect of abortive reference.

CHAP. V.

4 Eq. 529), the contract cannot be enforced. So, where buildings or works have been agreed to be done in such manner as a third person should direct, and he has failed to give any direction, specific performance has been refused. (*Earl of Darnley v. London, Chatham and Dover Rail. Co.*, 36 L. J., Ch. 404; L. R., 2 H. L. 43; *Tillett v. Charing Cross Bridge Co.*, *supra*.)

In the case of a valuation, however, if the valuer is willing to act, and the one party throw obstacles in his way, the court will order him to allow the valuer to enter on the premises for the purposes of the valuation. (*Smith v. Peters*, 44 L. J., Ch. 613; L. R., 20 Eq. 511; *Morse v. Merest*, 6 Madd. 26; and see *Dinham v. Bradford*, L. R., 5 Ch. 519.) And where the valuation fails by default of the valuers, but the purchaser retains the property, he is liable to an action for the value thereof on a *quantum meruit*. (*Clarke v. Westrope*, 25 L. J., C. P. 287; 18 C. B. 765; *Thurnell v. Balbirnie*, 2 M. & W. 786.) So, on the ground of part performance, the court may enforce an agreement some of the terms of which are left to be settled by arbitration, which has failed. (*Hart v. Hart*, 50 L. J., Ch. 697; 18 Ch. D. 670.)

Agreements
to refer future
differences.

It is a common practice to insert in partnership deeds, leases, contracts for works, policies of insurance, and other contracts, covenants or agreements providing that any differences or disputes thereafter arising between the parties shall be referred to arbitration. Agreements of this kind do not deprive the courts of jurisdiction over the matters agreed to be referred; nor will the addition of a covenant not to sue in respect of such matters prevent either party from bringing them into court (*Horton v. Sayer*, 4 H. & N. 643; 7 W. R. 735; *Lee v. Page*, 30 L. J., Ch. 857), for such a covenant is an agreement to oust the jurisdiction of the courts, and it is established that, on grounds of public policy, any

agreement to oust the jurisdiction of the courts is void. Char. V.
 (Broom. Com. 44; see *Ripley v. Great Northern Rail. Co.*,
 31 L. T. 869, *per* Jessel, M.R.)

Though an agreement not to sue on a contract is void, the same result is attainable by the parties agreeing that the award of an arbitrator shall be a condition precedent to the right to sue. This may be done by a stipulation that no right of action shall arise until matters in dispute have been referred to and ascertained by arbitration (*Scott v. Avery*, 5 H. L. Ca. 812; 25 L. J., Ex. 308; *Caledonian Insurance Co. v. Gilmour* [1893] A. C. 85; *Brown v. Overbury*, 11 Ex. 715; *Tredwen v. Holman*, 31 L. J., Ex. 398; 1 H. & C. 72; *Elliott v. Royal Exchange Assurance Co.*, L. R., 2 Ex. 237; 36 L. J., Ex. 129; *Alexander v. Mendl*, 22 L. T., N. S. 609; *Edwards v. Aberayron, &c. Insurance Co.*, 44 L. J., Q. B. 67; 1 Q. B. D. 563; *Sharpe v. Sao Paulo Rail. Co.*, L. R., 8 Ch. 597; *Trainor v. Phœnix Fire Assurance Co.*, 65 L. T. 825; *Scott v. Mercantile, &c. Insurance Co.*, 66 L. T. 811; *Viney v. Bignold*, 20 Q. B. D. 172; 57 L. J., Q. B. 82), or by a contract to pay such a sum only as shall in case of difference be ascertained by an arbitrator. (*Brannstein v. Accidental Death Insurance Co.*, 31 L. J., Q. B. 17; 1 B. & S. 782.)

The principle of these cases is applicable to what are often spoken of as, but are not in fact, arbitration clauses, viz., stipulations in building contracts and the like, by which the contractor's right to payment is made conditional upon the contractor obtaining the certificate of the employer's architect or engineer. Architect's
certificate
condition to
payment.
 (*Scott v. Corporation of Liverpool*, 28 L. J., Ch. 230; 3 De G. & J. 334; *Westwood v. Secretary of State for India*, 11 W. R. 261; *Richards v. May*, 10 Q. B. D. 400; 52 L. J., Q. B. 272; *London Tramways Co. v. Bailey*, 37 L. T. 499.)

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Reference not
a condition
precedent, but
collateral
stipulation.

It is necessary to distinguish between cases where the stipulation for a reference is a condition precedent and where it is only a collateral agreement. (*Viney v. Bignold*, *supra*.) Thus, where there are two independent covenants, one to do a certain thing and if it is not done to pay damages, and the other, that if the parties cannot agree upon the amount of the damages, it shall be ascertained by arbitration, the latter stipulation is no bar to an action on the former. (*Elliott v. Royal Exchange Assurance Co.*, 36 L. J., Ex. 129; L. R. 2 Ex. 237, *per* Bramwell, B.) It is often difficult to determine when there are two independent covenants. Thus, a covenant that in case of damage to crops by hares, "the defendant would pay a fair and reasonable compensation for the same, the amount of such compensation in case of difference to be referred to arbitration," was held to be in reality two independent covenants, and the arbitration was not a condition precedent to a right to sue (*Dawson v. Fitzgerald*, 45 L. J., Ex. 893; 1 Ex. D. 257; and see *Collins v. Locke*, 48 L. J., P. C. 68; 4 App. Cas. 674); while an agreement to deliver up a furnished house and effects in good order, "and in the event of any loss, damage, or breakage to make good or pay for the same; the amount of such payment, if in dispute, to be referred," was held to make the reference a condition precedent. (*Babbage v. Coulbourn*, 9 Q. B. D. 235; 52 L. J., Q. B. 50.)

Award only
condition pre-
cedent as to
matters with-
in express
terms of con-
tract.

A stipulation making the award or certificate of a third person a condition precedent to the right to sue will not be held to extend to subject-matters not clearly contemplated by the parties. (*Roberts v. Bury Commissioners*, 39 L. J., C. P. 129; L. R., 5 C. P. 310; *Collins v. Locke*, 41 L. T. 292; *Lawson v. Wallasey Local Board*, 48 L. T. 507; *Alexander v. Campbell*, 41 L. J., Ch. 478.) Where a building contract contained a clause that, in case of difference between the contractor and his

employer, the award in writing of the architect, in all matters connected with the works or their execution, or the value of extra work, or reductions, or the meaning of the plans or specifications, should be a condition precedent to any proceeding whatever at law or in equity in respect of any matter or thing which could or might be the subject of such award; it was held that the architect's award was not a condition precedent to an action by the employer against the contractor for not completing the buildings and for leaving them unfinished. (*Mausfield v. Doolin*, 4 Ir. R., C. L. 17; *Lamprell v. Billericay Union*, 3 Ex. 283; 18 L. J., Ex. 282.)

A contract for the sale of goods contained a stipulation for a fair allowance for inferior quality, the amount to be ascertained by reference, but no claim to be entertained unless the reference was demanded within fourteen days of the landing of the goods. The fact that the reference was not so demanded was held a good defence to an action claiming in respect of inferior quality. (*Poupe v. Fuchs*, 34 L. T. 800.)

Even where an agreement to refer contains no provision against the accrual of a right to sue until arbitration has been resorted to, legal proceedings will seldom be permitted to be carried on now in respect of matters within the scope of such an agreement, for upon proceedings being commenced by the one party the other may apply to the court for a stay of proceedings under section 4 of the Arbitration Act, 1889, which provides as follows:—“ If any party to a submission, or any person

Proceedings contrary to an agreement to refer stayed.

52 & 53 Vict. c. 49, s. 4.

* The corresponding provision in the C. L. P. Act, 1854, was section 11, which enacted as follows:—“ Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against

17 & 18 Vict. c. 125, s. 11.

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claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Counterclaim
a commence-
ment of legal
proceedings.

For the purposes of this section, a counterclaim has the same effect as a cross action, and where there is an agreement to refer the subject-matter of a counterclaim it may be stayed on the application of the plaintiff. (*Spartali v. Van Hoorn*, 76 L. T. Journ. 259; 28 Sol. J. 270; Mathew, J., in chambers.) In such a case the delivery of the counterclaim is the commencement

the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."

of legal proceedings within the meaning of the section. (*Chappell v. North* [1891] 2 Q. B. 252; 60 L. J., Q. B. 554.)

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The Act does not give to an agreement to refer the effect of depriving a plaintiff of his right of action, but it enables the defendant to take advantage of the agreement by application to stay proceedings in the action and compel the plaintiff to resort to his remedy by arbitration. (*Roper v. London*, 1 E. & E. 825; 28 L. J., Q. B. 260.)

Effect of the section.

In *Blythe v. Lafone* (1 E. & E. 435; 28 L. J., Q. B. 164) it was held that power to stay proceedings does not arise in an action upon a deed or instrument unless the instrument itself contains an agreement to refer differences, though the parties have made such an agreement in writing subsequently to the differences arising. But this decision has been overruled. (*Mason v. Haddon*, 6 C. B., N. S. 526; *Randell v. Thompson*, 45 L. J., Q. B. 713; 1 Q. B. D. 748; *Deutsche Springstoff, &c. v. Briscoe*, 20 Q. B. D. 177; 57 L. J., Q. B. 4.) Where there were two contemporaneous instruments relating to the same subject-matter, one of which contained an arbitration clause and the other did not, the two documents were treated as one, and the arbitration clause held to apply to questions arising under the instrument which did not contain the clause. (*Wade-Gery v. Morrison*, 37 L. T. 270; and distinguish *Turnock v. Sartoris*, 43 Ch. D. 150.)

Agreement to refer not necessarily in instrument giving cause of action.

There must, however, be a subsisting agreement to refer. (*Moffat v. Cornelius*, 39 L. T. 102; *Piercy v. Young*, 14 Ch. D. 200.)

Must be subsisting.

In *Hattersley v. Hutton* (3 F. & E. 116), where the parties had gone on dealing upon the terms of a former and satisfied agreement, which contained a clause for reference, it was held to be within the statute. So, where partnership articles for a term contained an arbitration clause, and after the expiration of the term

Verbal dealings upon terms of writing containing agreement to refer.

CHAP. V.

the parties, by verbal arrangement, continued in partnership upon the terms of the old articles, it was held that there was an agreement in writing within the section. (*Gillett v. Thornton*, 44 L. J., Ch. 398; L. R., 19 Eq. 599; *Cope v. Cope*, 52 L. T. 607.)

Agreement to refer to foreign tribunal.

A partnership agreement between British subjects trading in a foreign country, providing for a reference of disputes to a foreign tribunal, is within the section. (*Law v. Garrett*, 8 Ch. D. 26; 38 L. T. 3.)

Application to stay, when made.

The application to the court must be made not only before the delivery of a statement of defence (*West London Dairy Society v. Abbott*, 44 L. T. 376; 29 W. R. 584), but before the defendant takes a "step in the proceedings." Application to the court for leave to administer interrogatories (*Chappell v. North* [1891] 2 Q. B. 253; 60 L. J., Q. B. 554), or for an extension of time to deliver defence (*Ford's Hotel Co. v. Bartlett* [1896] A. C. 1; 65 L. J., Q. B. 166), or for security for costs (*Adams v. Catley*, 66 L. T. 687), or any other application to the court for an order in the proceedings, is a "step" within the meaning of the section. But a notice to the plaintiff requiring a statement of claim is not a step (*Ives v. Willans* [1894] 2 Ch. 478; 63 L. J., Ch. 521), neither is an application to the other side for extension of time, or any other application which is acceded to without going to the court. (*Brighton Marine Palace and Pier v. Woodhouse* [1893] 2 Ch. 486; 62 L. J., Ch. 697.)

"Step in the proceedings."

By whom.

Where there are more defendants than one, they need not all join in the application. (*Willesford v. Watson*, 42 L. J., Ch. 447; L. R., 8 Ch. 473.)

"Person claiming through or under" a party.

The better opinion seems to be that the trustee of a bankrupt is not a person claiming "through or under" one of the parties to a reference within the meaning of the Act, and it is doubtful whether such a trustee, who is a defendant, is a party entitled to make the application within the section (*Piercy v. Young*, 14 Ch. D. 200), and

it is equally doubtful if the court has power to stay proceedings commenced by the trustee in respect of matters agreed to be referred by the bankrupt. (*Pennell v. Walker*, 26 L. J., C. P. 9; 18 C. B. 651; and see *Sturgis v. Curzon*, 21 L. J., Ex. 38.)

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The application is made in chambers, by summons, which may be dealt with by a master or chief clerk.

Mode of application.

There must be an affidavit by the applicant of his readiness and willingness to refer at the time when the action was brought. (*Piercy v. Young*, 14 Ch. D. 200; 28 W. R. 845.) And it must be shown that the matters in dispute are within the agreement to refer. (*Ib.*; *Wood v. Robson*, 15 W. R. 756; *Deunehy v. Jolly*, 22 W. R. 449; *Gillett v. Thoruton*, *supra*.)

Evidence in support of application.

The court will generally decide whether the matters in dispute are within the agreement for arbitration, and not leave the point to be decided by the arbitrator (*Piercy v. Young*, 14 Ch. D. 200), though persons can agree to refer to arbitration not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause. (*Ib.* 208; *Willesford v. Watson*, L. R., 8 Ch. 473; 42 L. J., Ch. 447.) And where the dispute is one to which the arbitration clause applies the construction of the instrument and the extent to which its clauses apply in the particular case is for the arbitrator. (*Cope v. Cope*, 52 L. T. 607.) But the arbitrator cannot read into a contract a non-existing custom, so as to give himself a jurisdiction he would not otherwise possess. (*Hutcheson v. Eaton*, 13 Q. B. D. 861; 51 L. T. 846.)

"Matter agreed to be referred."

What is—when question for court and when for arbitrator.

The section in question does not take away the jurisdiction of the court to decide the disputes between the parties, but gives power to the court to stop an action in violation of an agreement to refer to arbitration, and to enforce the agreement between the parties, a power which did not exist before the passing of the 11th section

Staying proceedings matter of discretion with court.

CHAP. V. of the C. L. Procedure Act, 1854, which this section replaces. (*Davis v. Starr*, 41 Ch. D. 242; 58 L. J., Ch. 808; *London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, 40 Ch. D. 100; 58 L. J., Ch. 75.)

When proceedings will be stayed.

The exercise of the jurisdiction is a matter of discretion with the court (*Wickham v. Harding*, 28 L. J., Ex. 215)—a discretion to be exercised judicially and according to well-known and ordinary principles. (*Vardrey v. Simpson* [1896] 1 Ch. 166; 65 L. J., Ch. 369.) The *prima facie* duty of the court is to act upon the agreement of the parties. (*Willesford v. Watson*, 42 L. J., Ch. 447; L. R., 8 Ch. 473; *Laur v. Garrett*, 8 Ch. D. 26; 38 L. T. 3.) And the cases are rare in which the court ought to refuse the order to stay proceedings (*Russell v. Russell*, 49 L. J., Ch. 268; 14 Ch. D. 471), the burden being upon the plaintiff to show some reason why the dispute should not be referred. (*Vardrey v. Simpson*, *supra*; *Hodgson v. Railway Passengers' Assurance Co.*, 9 Q. B. D. 188; but see *Fox v. Railway Passengers' Assurance Co.*, 54 L. J., Q. B. 505; 52 L. T. 672.)

“No sufficient reason” against a reference.

The court has to be satisfied according to the varying circumstances of each particular case “that there is no sufficient reason why the matter should not be referred in accordance with the submission.” (*Fox v. Railway Passengers' Assurance Co.*, *supra*; *Vardrey v. Simpson*, *supra*.) In *Lyon v. Johnson* (40 Ch. D. 579; 58 L. J., Ch. 626), Kay, J., notwithstanding the subject-matter of the action was within the arbitration clause, refused a stay, but assigned no reason for doing so. It is not sufficient reason against an order to stay, that, the particular matter cannot be conveniently decided by arbitration. (*Denton v. Legge*, 72 L. T. 627.)

Suggested bias of arbitrator.

The court will not refuse to stay an action, where the matters in difference have been agreed to be referred to the engineer of one party, on the ground that the engineer is in substance a judge in his own cause, unless

there is sufficient reason to suspect that he will act unfairly. (*Ives v. Wilans* 1894 2 Ch. 478; 63 L. J., Ch. 521.)

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If the matter in dispute is clearly within the terms of the agreement to refer, the court will stay the proceedings, even though the question raised is one purely of law upon the construction of the agreement (*Randegger v. Holmes*, L. R., 1 C. P. 679; *Willesford v. Watson*, *supra*; *Forwood v. Watney*, 49 L. J., Q. B. 447; *Plews v. Baker*, L. R., 16 Eq. 564; 43 L. J., Ch. 212; *Cope v. Cope*, 52 L. T. 607), though, in one case, where an arbitration clause, under which a policy of insurance was issued, provided for the reference of all differences to average staters, Bacon, V.-C., held that a point of law was not a "difference" contemplated by the agreement. (*Alexander v. Campbell*, 41 L. J., Ch. 478.)

When questions of law in dispute.

And where it was admitted that the only question in dispute was one of law, which the court thought an arbitrator would refer back to the court in the form of a special case, North, J., directed the summons to stand over until the question of law was decided, intimating that if any question of account remained, it could be referred to an arbitrator to settle the figures. (*Re Carlisle*, *Clegg v. Clegg*, 44 Ch. D. 200; 59 L. J., Ch. 520.)

It appears, at one time, to have been thought that the discretion to stay should not be exercised in a partnership action which involved the question of dissolution, and a motion to stay such an action has in some instances been refused. (*Cook v. Catchpole*, 34 L. J., Ch. 60; 10 Jur., N. S. 1068; *Joplin v. Postlethwaite*, 61 L. T. 629; *Turnell v. Sanderson*, 64 L. T. 654.) But it is clear, from recent authorities, that under the ordinary arbitration clause in partnership deeds, the arbitrator has power to award a dissolution (*Walmsley v. White*, 40 W. R. 675; *Fawcroy v. Simpson* [1896] 1 Ch. 166; 65 L. J., Ch. 369), and also the proper terms of such a dissolution,

Action for dissolution of partnership.

CHAP. V.

including, if necessary, the return of a premium. (*Belfield v. Bourne* [1894] 1 Ch. 521; 63 L. J., Ch. 104.) And the court, in such a case, has full discretion to determine whether the matters in dispute, including that of dissolution, shall be tried out in the action or referred to arbitration. (*Vawdrey v. Simpson*, *supra*; *Russell v. Russell*, 14 Ch. D. 471; 49 L. J., Ch. 268; *Plews v. Baker*, L. R., 16 Eq. 564; 43 L. J., Ch. 212.)

Action for
wrongful
dismissal.

Where a contract for employment for five years provided that the defendants might dismiss the plaintiff if he were guilty of gross misconduct, followed by an arbitration clause, and the defendants dismissed the plaintiff, who thereupon brought his action for wrongful dismissal, it was held that the defendants were entitled to a stay of the action (*Renshaw v. Queen Anne Mansions Co.* [1897] 1 Q. B. 662; *Wickham v. Harding*, 28 L. J., Ex. 215); but a stay was refused where the defendant declined to submit the question of the right to dismiss, and only submit the assessment of damages. (*Davis v. Starr*, 41 Ch. D. 242.)

When action
claims injunc-
tion or re-
ceiver.

It is no objection to the order that the action claims an injunction, for the plaintiff would have power to apply to the court for one at any time (*Willesford v. Watson*, 42 L. J., Ch. 447; L. R., 8 Ch. 473); or that the arbitrator cannot award an ejectment, since the court could give effect to his direction in that respect. (*Wade-Gery v. Morrison*, 37 L. T. 270.) So the court may appoint a receiver, and send the rest of the action to reference (*Compagnie du Senegal v. Smith*, 49 L. T. 527; 53 L. J., Ch. 166; 32 W. R. 111; *Pini v. Roncoroni* [1892] 1 Ch. 633; 61 L. J., Ch. 218), or may appoint a receiver pending a reference. (*Law v. Garrett*, 8 Ch. D. 26; 38 L. T. 3.)

When order
refused.

It has been held that proceedings will not be stayed where the object of the defendant is merely to delay the plaintiff (*Lury v. Pearson*, 1 C. B., N. S. 639), or to stop

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an action, and not merely to settle a dispute which the defendant desired to refer before the action was commenced (*Witt v. Corcoran*, L. R., 8 Ch. 476, n., explained 16 Eq. 571), or where there are several matters in dispute some only of which are within the agreement to refer (*Wheatley v. Westminster, &c. Coal Co.*, 2 Dr. & Sm. 347; *Turnock v. Sartoris*, 43 Ch. D. 150; 38 W. R. 340), and the matters not within the agreement are the main matters in dispute (*Ives v. Willans* 1894, 2 Ch. 478; 63 L. J., Ch. 521), or where the defendant was not ready before action to refer the whole dispute to arbitration, notwithstanding he withdraws his objection after the commencement of the action (*Davis v. Starr*, 41 Ch. D. 242; 58 L. J., Ch. 808, explained in *Reushaw v. Queen Anne Mansions Co.* 1897, 1 Q. B. 662), or where the court is not satisfied that the defendant was ready before action to concur in all necessary acts to have the matter decided by arbitration (*For v. Railway Passengers' Assurance Co.*, 52 L. T. 672), or where the arbitrator would not have power completely to deal with the case (*Cook v. Catchpole*, 34 L. J., Ch. 60; 10 Jur., N. S. 1068), or the reference agreed upon is not adapted to the special circumstances (*Hirsch v. Im Thurn*, 4 C. B., N. S. 569; 27 L. J., C. P. 254), or where, in consequence of some of the contemplated parties not having entered into the agreement, it would be contrary to the intention of the parties to refer the matter in dispute to arbitration. (*Mason v. Haddon*, 6 C. B., N. S. 526.) Where a time was limited for referring disputes under partnership articles, and the time had been allowed to expire, except as to one isolated dispute, the court refused to separate this matter from the other disputes and refer it to arbitration. (*Young v. Buckett*, 51 L. J., Ch. 505; 46 L. T. 266.)

It seems to have been formerly considered that where an inquiry involved a charge of fraud the court should not stay proceedings. (*Wallis v. Hirsch*, 1 C. B., N. S.

Action charging fraud.

CHAP. V.

316; 26 L. J., C. P. 72; *Kitchen v. Turnbull*, 20 W. R. 253.) More recently (*Russell v. Russell*, 49 L. J., Ch. 268; 14 Ch. D. 471), Jessel, M.R., held that the mere fact that personal fraud was charged in an issue between two partners was not of itself a sufficient reason for declining to stay an action; though if the person charging fraud does not desire a reference the court may, on a *prima facie* case of fraud being shown, refuse to stay the proceedings; but where the person charged with fraud desires an investigation before a public tribunal the court ought to refuse to refer the matters. (And see *Minifie v. Railway Passengers' Assurance Co.*, 44 L. T. 552.) The alleged fraud must be relevant to the inquiry. (*Hirsch v. Im Thurn*, 27 L. J., C. P. 254; 6 W. R. 605; *Alexander v. Mendl*, 22 L. T., N. S. 609.)

“Differences”—admitted claim, but disputed counterclaim.

If a plaintiff commence an action for a liquidated amount under a contract, and the defendant sets up a *bonâ fide* counterclaim under the same contract, there are “differences” under which he is entitled to a stay of proceedings. (*Russell v. Pellegrini*, 26 L. J., Q. B. 75; 6 E. & B. 1020.)

Though this decision was disapproved in the Exchequer (*Daunt v. Lazard*, 27 L. J., Ex. 399), it has since been followed in the Common Pleas. (*Seligmann v. Le Boutillier*, L. R., 1 C. P. 681.)

Control of court over proceedings notwithstanding order to stay.

Notwithstanding an order to stay proceedings, the court has still jurisdiction over the matter, and the order may be varied at any time, even after the award is made. (*Bustros v. Lenders*, 40 L. J., C. P. 193; L. R., 6 C. P. 259.) In the Chancery Division, where the order always reserves liberty to apply, this means a general liberty to apply at any time, either before or after the award. (*Compagnie du Senegal v. Smith*, 49 L. T. 527; 32 W. R. 111.)

Jurisdiction of courts ousted by statute.

Many Acts of Parliament contain arbitration clauses ousting the courts of their jurisdiction. An agreement

to refer under section 2 of the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), is, under section 26, obligatory upon and ousts the jurisdiction of the courts (*Watford Rail. Co. v. London and North Western Rail. Co.*, 38 L. J., Ch. 449; L. R., 8 Eq. 231), but only if one of the companies insists upon a reference. (*London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, 40 Ch. D. 100; 58 L. J., Ch. 75; and see *Wolverhampton, &c. Rail. Co. v. London and North Western Rail. Co.*, 43 L. J., Ch. 131; L. R., 16 Eq. 433; *Llanelli Rail. Co. v. Same*, 42 L. J., Ch. 884; 45 L. J., Ch. 539; L. R., 7 H. L. 550.)

SECT. 2.—*Submission by Order of Reference by Consent.*

The Arbitration Act, 1889, by section 14, enacts that "In any cause or matter (other than a criminal proceeding by the Crown), if all the parties interested who are not under disability consent, the court or a judge may at any time order the whole cause or matter to be tried before a special referee or arbitrator, or before an official referee or officer of the court."

Reference of
action 52 & 53
Vict. c. 49, s.
14.

Apart from this statutory provision, the High Court, by virtue of its inherent authority over an action which is pending, may at any stage of the proceedings, with the consent of all the parties, make an order referring the action to arbitration. (*Darlington Wagon Co. v. Harding and Trouville, &c. Co.* [1891] 1 Q. B. 245; 60 L. J., Q. B. 110.)

Inherent
power of court
to refer by
consent.

The order of reference may be made in chambers at any time before the action is called on for trial. When the reference is made at the trial the order will be drawn up by the associate if at *Nisi Prius* and by the registrar if in the Chancery Division.

A judge at *Nisi Prius* is a full court with a power to refer. (*Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 125.)

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Such refer-
ences only
when an ac-
tion pending.

If no action be pending, the courts have no jurisdiction over the matters, and the parties cannot refer by an order of court (*R. v. Hardey*, 14 Q. B. 529; 19 L. J., Q. B. 196); but if there be an action pending, any other matter in difference *dehors* the cause may be comprehended in the order of reference. (*Bonner v. Charlton*, 5 East, 139; *Hall v. Brand*, 53 L. J., Q. B. 19; 49 L. T. 492.) An order of reference by consent which includes matters in difference other than those in the action is not an order under the Arbitration Act, 1889, but owes its validity to the consent of the parties, and the award is final and cannot be reviewed by the court in the manner applicable to awards under an order of reference of an action alone. (*Darlington Wagon Co. v. Harding* [1891] 1 Q. B. 245.) A person not a party to the action may, by consent, be made a party to the reference, and will be bound by it and cannot retract it. (*Williams v. Lewis*, 7 E. & B. 928; *Rogers v. Stanton*, 7 Taunt. 575, n.)

When action
remains in
court notwith-
standing
references.

The effect of the reference of an action and other matters in difference, would seem to be to put an end to the action, as an action pending in the court (*Hall v. Brand*, *supra*; *Penrice v. Williams*, 52 L. J., Ch. 593; 23 Ch. D. 353; *Dick v. Milligan*, 2 Ves. jun. 24; *Wade v. Simeon*, 13 M. & W. 650), except for the purpose of entering judgment pursuant to power expressly reserved. It is otherwise where the order of reference is of the action only, for in such a case the action remains in court. (*Macalpine v. Calder* [1893] 1 Q. B. 545; 62 L. J., Q. B. 607.)

Reference on
the "usual
terms."

A reference is often agreed to be made on "the usual terms." These are well-known terms, which are embodied in the form given by R. S. C. App. K., No. 24. If it is necessary, such other terms, not included in the printed form, as may be agreed upon, are added.

To prevent an award being set aside through the arbitrator's omission to decide each issue separately, where costs abide the event, a clause is often inserted that it shall be sufficient for the arbitrator to find in the cause generally, unless either party shall request him to decide some particular issues. (*Morgan v. Thomas*, 9 Jur. 92.)

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Order shall relieve the arbitrator from deciding each issue,

The order to refer may, but need not, contain a clause to stay proceedings in the action: and if the award is likely to be for a less sum than sufficient to carry costs under the County Courts Act, or to be such as, if the cause had been tried, would require the certificate of the judge to give the plaintiff costs, power should be given to the arbitrator to certify in the same manner as a judge might have done.

and give power to certify,

The court or a judge shall, as to references under order of the court or a judge, have all the powers which are by this Act conferred on the court or a judge as to references by consent out of court. (Arbitration Act, 1889, s. 16.)

Court same powers as in reference out of court.

In all cases of reference to an arbitrator under an order of the court or a judge, in any cause or matter, the arbitrator shall be deemed to be an officer of the court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by the rules of court, and subject thereto as the court or a judge may direct. (Arbitration Act, 1889, s. 15: *Palmer v. Hardwick*, 63 L. T. 302.)

Power of arbitrator under such reference.

The R. S. C. Order XXXVI, rules 48 to 55b, confer a variety of powers upon referees, and by rule 55e the provisions of rules 48 to 55 and of rule 55b of Order XXXVI shall apply, where any cause or matter, or any question or issue of fact therein, is referred to an arbitrator. These are dealt with in detail in subsequent parts of the work.

The judge of a county court may, with the consent of

In the county court.

CHAP. V.

both parties, at any time after an action has been commenced, in all cases within the ordinary jurisdiction of the court, and in cases in which, by agreement under section 64 of the County Courts Act, 1888, the parties have consented that the court shall have jurisdiction, order the action, with or without other matters, within the jurisdiction, in dispute between the parties, to be referred to arbitration, in such manner, and on such terms as he shall think reasonable and just. The reference is not revocable except by consent of the judge. The award is to be entered as the judgment in the action. But the judge may, if he think fit, on application to him at the first court held after the expiration of one week after the entry of such award, set aside the award, or with the consent of the parties revoke the reference or order another reference. (51 & 52 Vict. c. 43, s. 104, C. C. R., 1889, Order XX.) There is no appeal from the refusal of the judge to set aside an award in an action referred by him. (*Mayer v. Farmer*, 3 Ex. D. 235; 47 L. J., Ex. 760.)

SECT. 3.—*Compulsory Reference.*

Compulsory
reference by
statute.

By the common law of England there is no power of compelling persons to refer. For obvious reasons of public policy the C. L. P. Act, 1854, introduced provisions for the compulsory reference of actions where the disputes were regarding mere matters of account.

This power of compulsory reference was extended by the Judicature Act, 1873 (36 & 37 Vict. c. 66, ss. 56, 57), and by the Judicature Act, 1884 (47 & 48 Vict. c. 61, ss. 9, 10).

Reference for
inquiry and
report.

These special provisions have all been repealed and replaced by sections 13 and 14 of the Arbitration Act, 1889. Section 13, so far as at present material, is as follows:—"Subject to rules of court and to any right to

have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee."

Section 14 is as follows:—"In any cause or matter (other than a criminal proceeding by the Crown), (a) if all the parties interested who are not under disability consent: or (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury or conducted by the court through its other ordinary officers: or (c) if the question in dispute consists wholly or in part of matters of account; the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court."

Reference for trial.

These provisions are considered at length in Chapter XIX.

An order of reference under either section, may be made in chambers on summons (R. S. C. Order LIV, r. 12a), or may be made at the trial. (*Hoch v. Boor*, 49 L. J., C. P. 665.)

How and when reference may be made.

As the power to refer under section 13, is "subject to any right to have particular cases tried by a jury," where such a right exists (see R. S. C. Order XXXVI, rr. 3—7a), the order cannot be made until the time has passed for requiring a jury. Under section 14 the order may be made at "any time."

Notwithstanding a compulsory reference the cause still remains in court. (*Edwards v. Edwards*, 28 L. J., C. P. 25; 5 C. B., N. S. 536.)

Power is given to the court of quarter sessions compulsorily to refer appeals under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133, ss. 48, 49), and the

Compulsory references at quarter sessions.

CHAP. V.

Highway Act, 1864 (27 & 28 Vict. c. 101, ss. 40, 41), when they consist wholly, or in part, of mere matters of account.

The provisions of the Common Law Procedure Act 1854, were made applicable to such references, and now they are governed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49, s. 24).

SECT. 4.—*Submission under particular Statutes.*

Enactments empowering the reference to arbitration of particular matters usually indicate the mode of submission.

Submission
under the
L. C. C. Act,
1845.

The mode of referring matters authorized under the L. C. C. Act, 1845, is thus pointed out by section 25 :—
“ When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for

the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final."

The submission may be made a rule of any division of the High Court on the application of any of the parties. (Section 36; and see *Re Hawley and North Staffordshire Rail. Co.*, 2 De G. & S. 33; *Re Ware*, 9 Ex. 395; 23 L. J., Ex. 145.) But such a step is no longer necessary, as, under section 1 of the Arbitration Act, 1889, the submission has the same effect as if it had been made an order of court.

May be made a rule of court.

If both parties concur in the appointment of an arbitrator, all that is necessary is, that the appointment should be signed by the claimant and the secretary of the company; a strict compliance with the various preliminary steps only being required when the reference is compulsory. (*Collins v. South Staffordshire Rail. Co.*, 7 Ex. 5; 21 L. J., Ex. 247.)

Preliminary forms only required in compulsory cases.

If the amount claimed is not paid or agreed to be paid within twenty-eight days (s. 68) it is the duty of the claimant (and of the promoters also) to endeavour to procure the appointment of a single arbitrator before nominating an arbitrator on his own behalf. (*Yates v. Mayor of Blackburn*, 29 L. J., Ex. 447; 6 H. & N. 61.) The award of an umpire will not, however, be bad because no effort has been made to appoint a single

Steps to be taken before nominating an arbitrator.

CHAP. V.

arbitrator. (*Eagle v. Charing Cross Rail. Co.*, 36 L. J., C. P. 297; L. R., 2 C. P. 638.) If unsuccessful in the attempt to agree upon a single arbitrator, he should appoint an arbitrator himself and notify the appointment to the promoters, and request them in writing to appoint an arbitrator on their part. (*Bradley v. London and North Western Rail. Co.*, 5 Ex. 769; 20 L. J., Ex. 3.) Should they fail to do so for fourteen days he may then appoint an arbitrator to act for both parties. The reason of the notice is to afford the other side an opportunity to acquiesce in the appointment already made. (*Ib.*) The notice should be in express terms; it is not sufficient to state an intention of appointing, but an actual appointment should be made and delivered to the arbitrator and notice thereof given to the promoters. (*Ib.*)

How companies should appoint an arbitrator.

The company's appointment is required to be under the hands of the "promoters or any two of them," or of their secretary or clerk (s. 25). It ought to be made under the hands of the secretary, for the word "promoters" refers to the company; but it is difficult to say who are two of the company. If the interpretation clause had included the word "directors" in the word "promoters" this difficulty would not have arisen.

Notice of appointment to other side.

An appointment by either side is not complete until communicated to the other side. (*Tew v. Harris*, 11 Q. B. 7; 17 L. J., Q. B. 1.)

Appointment under protest.

A company does not by nominating an arbitrator under protest, admit that the case is one entitling the claimant to any compensation. (*Sutton Harbour Improvement Co. v. Hitchens*, 1 De G., M. & G. 161.)

When submission may be revoked.

Though neither party may revoke the submission without the consent of the other, yet, if it clearly appear that the arbitrator or umpire is about to exceed his jurisdiction, the court may interfere on an application

to revoke the submission. (*Fariell v. Eastern Counties Rail. Co.*, 17 L. J., Ex. 223 ; 2 Ex. 344.)

A submission under this Act may, by consent, be made to embrace incidents and impart powers not included in a reference which proceeds simply on the statutory clauses. (*Caledonian Rail. Co. v. Lockhart*, 3 Macq. 808.) And if the parties agree that two persons named shall nominate the arbitrator, instead of doing so themselves, it will not be a reference under the statute, though it may be on the terms of it. (*Martin v. Leicester Waterworks Co.*, 3 H. & N. 463 ; 27 L. J., Ex. 432.)

Similar provisions are also made in the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20, ss. 126—137) ; the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16, ss. 128—134), and other statutes, as to the mode of submitting matters by those statutes respectively authorized to be referred.

Submissions
under other
statutes.

Submissions under the Railway Companies Arbitration Act, 1859, must be in writing under the common seals of the submitting companies. (22 & 23 Vict. c. 59, s. 2.)

The provisions as to the mode of submitting disputes contained in the Public Health Act, 1875 (38 & 39 Vict. c. 55, ss. 179—181), are similar to those in the L. C. C. Act, 1845, except that every appointment of an arbitrator on behalf of the local authority must be under their common seal, and on behalf of any other party under his hand. An appointment by the local authority under seal, but by the other party not in writing, is bad, and everything done under it is invalid. (*Re Gifford and Bury Town Council*, 20 Q. B. D. 368 ; 57 L. J., Q. B. 181.)

By reason of the similarity of language, the decisions under the L. C. C. Act, 1845, are authorities upon the construction of the other statutes. It is important, therefore, to note that where arbitrators are appointed by both parties under section 25 of the former Act there

Statutory
submissions
within the
Arbitration
Act, 1859.

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is a "submission" within the meaning of the Arbitration Act, 1889, and that it attaches the powers of that statute, enabling the court to enlarge the time for making the award, or to remit the matter to the arbitrators for reconsideration (*Re Dare Valley Co.*, L. R., 4 Ch. 554; 38 L. J., Ch. 417), and giving the arbitrator power to state a special case. (*Rhodes v. Airedale Drainage Commissioners*, 1 C. P. D. 402; 45 L. J., C. P. 861; *Bidder v. North Staffordshire Rail. Co.*, 4 Q. B. D. 412; *Isitt v. Railway Passengers' Assurance Co.*, 22 Q. B. D. 504; 58 L. J., Q. B. 191.)

CHAPTER VI.

WHAT MATTERS ARE INCLUDED IN A SUBMISSION.

A SUBMISSION should be distinctly framed so as to embrace all matters, and those only, which the parties mean to refer. CHAP. VI.

In an instrument, of which the sole or principal object is a reference, a general submission of "all matters in difference between the parties" will empower the arbitrator to adjudicate on all disputes affecting their civil rights (*Baker v. Townsend*, 7 Taunt. 422); even on rights in *autre droit*, such as claims in their capacity as executors or administrators, or on behalf of their wives. (*Elletson v. Cummins*, 2 Stra. 1144; *Morse v. Sury*, 8 Mod. 212; *Lumley v. Hutton*, Cro. Jac. 447.) So a reference in an action of "all matters in dispute between the parties" will be a general submission; while a submission of "all matters in dispute in the action" is confined to matters actually in dispute in the action. (*Malcolm v. Fullarton*, 2 T. R. 645; *Smith v. Muller*, 3 T. R. 624, 626, *per* Buller, J.) A submission of "all debts and demands" comprehends all, whether by simple contract or specialty. (*Roberts v. Mariett*, 2 Saund. 190.) A submission of "all actions" extends only to actions pending, and not to causes of action (Co. Litt. 285); but "actions and complaints" would include the latter. (Com. Dig. "Arb." D. 4.)

A submission which in terms is general may be controlled by the context or the nature of the instrument. Unless controlled by context.

In an instrument creating a contractual relationship between the parties as to other matters than a reference, with an arbitration clause as part of the contract, Or nature of contract.

CHAP. VI.

general words of reference will ordinarily be limited to differences arising out of the relationship created by the contract.

Thus, where a partnership agreement contained a provision that "any differences or disputes which may arise between the partners shall be settled by arbitration," it was held that it must not be read literally as applicable to *all* differences between the partners (*Piercy v. Young*, 14 Ch. D. 200; 42 L. T. 710), but to differences relating to matters the subject of the previous articles in the partnership instrument. (*Ib.*, *per* Baggallay and Thesiger, L.JJ.)

A clause in a contract, "all disputes to be settled by arbitration," was held to mean all disputes in respect of the contract or its construction. (*Re Hohenzollern Actien, &c.*, 54 L. T. 596.)

Not controlled
by specific
recital.

A submission of all matters in difference is not controlled by a recital of some specific matters. (*Charlton v. Spencer*, 3 Q. B. 693.) Where, however, a submission to arbitration referred the amount of loss by fire on "wool in the process of wooling, carding, scribbling, and spinning," but in other parts of the submission "raw wool" was spoken of, the arbitrator was held to be justified in refusing to take into his consideration wool in the process of manufacture, but not at the time of the fire in any of the carding machines. (*Re Hurst*, 1 H. & W. 275.)

Where the submission specifies certain matters upon which the arbitrator is to award, this excludes other matters not mentioned, although they are issues in the same action out of which the reference arises. (*Sowdon v. Mills*, 30 L. J., Q. B. 175.)

Construction
of the con-
tract.

On a reference of "any dispute arising out of a contract" the arbitrator may decide a dispute as to the construction of the contract. (*Thorburn v. Barnes*, L. R., 2 C. P. 384; 36 L. J., C. P. 184; and see *ante*,

p. 59.) But he may not alter or add to the contract; and where a contract for the sale of goods provided for the settlement by arbitration of "any disputes arising on this contract" it was held that the arbitrators were not entitled to read into the contract a custom which did not exist. (*Hutcheson v. Eaton*, 13 Q. B. D. 861; 51 L. T. 846.)

The arbitrator has no power to make a new contract for the parties. (*Hooper v. Balfour*, 62 L. T. 646.) Where the only dispute submitted to an arbitrator is a buyer's right to reject goods on the ground of inferiority in quality to those contracted for (see *Hegworth v. Hutchinson*, L. R., 2 Q. B. 447) the arbitrator has no power to make an award that the purchaser shall take the goods with an allowance. (*Sinidino v. Kitchen*, Cab. & E. 217; *Re Green and Balfour*, 63 L. T. 97; 325.)

Ordinarily a submission does not empower the arbitrator to determine whether matters in dispute are included in the submission (*Piercy v. Young*, 14 Ch. D. 200; 42 L. T. 710), though the submission may be drawn so wide as to include not only the construction of the document, but also the question as to whether acts complained of, are, or are not, within the terms of the matters agreed to be referred. (*Willesford v. Watson*, L. R., 8 Ch. 473; 42 L. J., Ch. 447; *ante*, p. 57.)

Under a general submission by partners of all matters in difference between them, the arbitrator may award a dissolution and a return of the premium (*ante*, p. 59), may direct that money shall be paid or secured by one partner to the other (*Sinmonds v. Swaine*, 1 Taunt. 549), may apportion the assets between them (*Lingood v. Eade*, 2 Atk. 505), may direct mutual releases (*ib.*) and conveyances. (*Wood v. Wilson*, 2 Cr. M. & R. 241.)

A claim made and abandoned before the arbitrator, or withdrawn, is not a matter in difference (*Bird v. Cooper*, 4 Dow. 148; *Lawrence v. Bristol and North Somerset Rail.*

CHAP. VI

Making new contract for parties—right to reject goods.

Determining matters included in the submission.

Partnership disputes.

What are "matters in difference."

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Co., 16 L. T., N. S. 326) ; but a claim made by one side before the arbitrator, and admitted by the other to be correct, is a "matter in difference," and must be adjudicated upon. (*Re Robson and Railston*, 1 B. & Ad. 723.)

Matters included in a former reference.

A reference of all matters in difference will not empower an arbitrator to go into a claim within the scope of a former reference in which the arbitrator directed mutual releases, notwithstanding the matter was not specifically considered and awarded on by the former arbitrator. (*Trimingham v. Trimingham*, 4 N. & M. 786.) Everything which might have been gone into on a previous reference must be taken to have been adjudicated upon. (*Smith v. Johnson*, 15 East, 213 ; *Birks v. Trippet*, 1 Saund. 28 c.)

But it is open to the parties to show that a cause of action subsisting at the date of a former reference had not then become "a matter in difference." (*Ravee v. Farmer*, 4 T. R. 146.)

Submission under L. C. C. Act, 1845.

In a submission under the L. C. C. Act, 1845, the arbitrator cannot decide a question of title (*Brandon v. Brandon*, 34 L. J., Ch. 333), and he can only award in respect of interests actually claimed by notice. (*Re Rhys and Dare Rail. Co.*, L. R., 6 Eq. 429 ; 37 L. J., Ch. 719.)

Submission includes only subsisting differences.

A reference of an action, is the action as it stands when the order is made, and the arbitrator could not deal with matters raised by subsequent pleadings. (*Ashworth v. Heathcote*, 6 Bing. 596 ; *Atkinson v. Jones*, 1 D. & L. 225 ; *Cooper v. Langdon*, 9 M. & W. 60.)

By R. S. C. Order XXXVI, r. 58, where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

A reference of all matters in difference between the parties gives the arbitrator power over all matters down

to the period of submission, but does not enable him to award on future and contingent claims (*Re Brown and Croydon Canal Co.*, 9 A. & E. 522; *Banfill v. Leigh*, 8 T. R. 571); nor will a submission of all existing differences and "anything in anywise relating thereto" extend the arbitrator's authority to matters arising after the submission, since matters relating to existing circumstances must themselves exist at the same time as the existing differences. (*Re Morphett*, 2 D. & L. 978, *per Coleridge, J.*) But the subsequent alteration or amendment of the instrument of reference by the parties makes the date thereof the period of the submission. (*Watkins v. Phillpotts*, M'Cl. & Y. 393.)

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Matters arising subsequently to the date of the submission, including accruing or contingent claims, may, by agreement of the parties, be included in the reference (*Re Brown and Croydon Canal Co.*, *supra*); and in *Brown v. Watson* (8 Scott, 391; 8 Dow. 22), where from the peculiar terms of the submission it appeared that the parties meant to treat a growing demand as if it were a bygone claim, the arbitrator was held justified in taking it into his consideration. (And see *Petch v. Coulan*, 7 Dow. 426.) Where an action having been brought for breaches of covenant to repair, the order referring the action and all matters in difference between the parties to an arbitrator, gave him power "to decide all matters and questions to do justice between the parties, and power to order and direct what shall be done by either or both of the said parties, either immediately or prospectively, whether relating to the action or to the other matters in difference," the submission was held to empower him to award damages for breach of covenant accruing up to the date of the award. (*Lewis v. Rossiter*, 44 L. J., Ex. 136; 23 W. R. 832.)

Subsequent
matters in-
cluded by
agreement

A power to deal with subsequent matters may some-
times arise by inference where the nature of the reference

or by in-
ference.

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indicates that the parties clearly meant it; thus, where an action of replevin having been brought in respect of a distress for an annuity, a reference was agreed to of "the cause and all matters in relation to the annuity in question," and the arbitrator awarded 50*l.* for arrears of the annuity due at the time of distress, and 40*l.* for arrears accruing between that time and the date of the order of reference, he was held not to have exceeded his authority. (*Wynne v. Wynne*, 3 Scott, N. R. 435.) And a railway company having taken possession of lands of the plaintiff, he brought an action of ejectment, which, with all matters in difference, was referred to an arbitrator, who was to settle the price of compensation; he was held entitled to take into consideration mesne profits down to the time of making his award. (*Smalley v. Blackburn Rail. Co.*, 2 H. & N. 158; 27 L. J., Ex. 65.)

A reference of all actions between A. and B. does not comprehend actions where A. and his wife are parties (Roll. Ab. "Arb." D. 4; *Barnardiston v. Fowler*, 10 Mod. 205), or in which A. and another are parties on one side and B. on the other. (*Fisher v. Pimbley*, 11 East, 189.) But where there is a reference of disputes between A. and B. on the one side and C. on the other, this is taken distributively, and gives the arbitrator the power to determine differences existing between them, or either of them; and therefore an award of a matter in dispute between A. and C., or even of a matter between A. and B., would be good, such disputes being embraced by this reference. (*Baspole's Case*, Yelv. 203; *Carter v. Carter*, 1 Vern. 259; *Winter v. White*, 3 Moore, 674; *Adcock v. Wood*, 6 Ex. 814; in error, 7 Ex. 468; 21 L. J., Ex. 204.)

No injunction
to restrain
arbitration
proceedings
as ultra the
agreement to
refer.

It is well established, that in arbitrations, a party can protest against the jurisdiction of the arbitrator and proceed with the case subject to the protest, without waiving his right to impeach the proceedings. (*Hamlyn v.*

Bettelley, 6 Q. B. D. 65; 50 L. J., Q. B. 3, *per* Lord Selborne.) So that generally an injunction will not be granted to restrain an arbitrator from acting on the ground of want of jurisdiction (*Great Western Rail. Co. v. Waterford and Limerick Rail. Co.*, 50 L. J., Ch. 513; 17 Ch. D. 493), or to restrain a person from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceedings may be futile and vexatious. (*North London Rail. Co. v. Great Northern Rail. Co.*, 11 Q. B. D. 30; 52 L. J., Q. B. 380; *Wood v. Lillies*, 61 L. J., Ch. 158; *Farrar v. Cooper*, 44 Ch. D. 323; 59 L. J., Ch. 506; *London and Blackwall Rail. Co. v. Cross*, 31 Ch. D. 354; 55 L. J., Ch. 313.)

The court has, however, jurisdiction to interfere by injunction on equitable grounds in proper cases (*London and Blackwall Rail. Co. v. Cross*, 31 Ch. D. 368), and arbitration proceedings may be restrained until the trial of an action in which the agreement containing the arbitration clause, is itself impeached. (*Kitts v. Moore* [1895] 1 Q. B. 253; 64 L. J., Q. B. 152; *Maunsell v. Midland Great Western Rail. Co.*, 1 H. & M. 133.)

Except action pending to impeach submission,

It is said also that the court will interfere where it is satisfied that injury will result to the party complaining if the arbitration is allowed to proceed (*Farrar v. Cooper*, *supra*), or where the party proceeding with the arbitration has, by his conduct, made it inequitable that he should be allowed to proceed. (*Pickering v. Cape Town Rail. Co.*, L. R., 1 Eq. 84.)

or on other equitable grounds.

In a case in which a contract for the sale of barley, provided that all disputes should be referred to arbitration according to the rules of the Liverpool Corn Exchange, and the buyer complained, and the seller admitted, that the barley supplied was not according to sample, an injunction was granted restraining the seller from

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proceeding to arbitration, as there was really nothing to try. (*Sissons v. Oates*, 10 Times L. R. 392.) But, where parties had entered into a contract (containing an arbitration clause) for dealing in shares, the court refused an injunction to restrain arbitration proceedings, on the application of one of the parties who alleged that the written contract was not the real agreement, and that the course of dealing under it had been gambling transactions, over which an arbitrator would have no jurisdiction. (*McHarg v. Universal Stock Exchange*, 11 Times L. R. 409.)

CHAPTER VII.

ALTERATION AND AMENDMENT OF THE SUBMISSION.

THE terms of a submission to arbitration, like any other agreement, may be altered, before the award is made, by the consent or further agreement of the parties. But to preserve the right of action on the original submission the alteration should be by an instrument of as high a nature as the submission, for, after the alteration, the instrument effecting the alteration becomes the submission, incorporating all the unaltered terms of the original submission. (*Greig v. Talbot*, 2 B. & C. 179.) Thus, where a submission was by deed, and a new arbitrator was, by a written memorandum, substituted in the place of one of the original arbitrators, such an appointment was held to constitute a new submission, not under seal, incorporating all the remaining provisions of the former submission. (*Re Tunno and Bird*, 5 B. & Ad. 488.) So, where there was an endorsed memorandum enlarging the time. (*Evans v. Thomson*, 5 East, 189; *Stephens v. Lowe*, 9 Bing. 32.)

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Submission
may be altered
by the parties.

The remedy by action on a deed of submission will be lost unless the alteration is also under seal (*Brown v. Goodman*, 3 T. R. 592, n. (b)), and then the remedy will depend upon whether the alteration is in writing or parol; if parol, the award cannot be enforced under the Arbitration Act, 1889.

A recognizance to perform the award of B. is not forfeited by the non-performance of the award of C., who, by the consent of the parties, is substituted for B. by order of court. (*H. v. Bingham*, 3 Y. & J. 101.)

The arbitrators have no power to alter the terms of

Not by
arbitrators.

CHAP. VII.

the submission; and where a submission contained no limit as to the time within which the award was to be made it was held that the arbitrators had no power to attach such a limit, so as to render an award made afterwards invalid. (*Re Morphet*, 14 L. J., Q. B. 259.)

Consent
orders of
reference
altered,

An order of reference by consent may be varied by the parties. Any agreed alteration should be by amendment of the order, drawn up according to the new agreement.

—but only by
consent.

An order of reference “by consent” is evidence of a previous express agreement between the parties to the terms of the order (*Lieresley v. Gilmore*, L. R., 1 C. P. 570; 35 L. J., C. P. 351; *Conolan v. Leyland*, 27 Ch. D. 632; 54 L. J., Ch. 123; *ante*, p. 64), which the court has no power to add to or subtract from. (*Thompsett v. Bowyer*, 30 L. J., C. P. 1.)

May be
amended to
further the
agreement of
the parties

It is, however, competent to the courts to amend orders of reference to effectuate the real intention of the parties where the orders have been erroneously or insufficiently drawn up. (*Vanderbyl v. McKenna*, L. R., 3 C. P. 252.) They cannot add anything which requires the further consent of the parties; but they can correct a clerical error, as, where the christian and surname of the defendant were transposed in the order (*Price v. James*, 2 Dow. 435); or insert such omitted matters as are incident to the substance of the agreement between the parties, as, in an order *at nisi prius*, that defendant should sell certain lands at a valuation, the words “that the defendant should make a good title and execute a conveyance of the premises” were added, such terms being implied in the original order (*Erans v. Senor*, 5 Taunt. 662); so, where a cause was referred on the “usual terms,” the court inserted a power to amend, which had been omitted in drawing up the original order (*Thompsett v. Bowyer*, 9 C. B., N. S. 284; 30 L. J., C. P. 1); and would insert a power to deal with the costs of the reference. (*Morel*

by inserting
omitted terms.

v. *Byrne*, 21 W. R. 673.) On a reference of a cause two orders of *nisi prius* were drawn up for the respective solicitors of plaintiff and defendants, which were not duplicates, but varied in their terms, and the defendants, after making their part of the order a rule of court, moved to set aside the award (the arbitrator having acted on the plaintiff's part of the order only), and the plaintiff made a counter motion to set aside the rule of court confirming the defendants' order as incorrect; the court directed a reference to the associate to ascertain which of the two orders was drawn up in accordance with his minutes of the agreement made at the trial, and on receiving his report set aside the rule of court confirming the defendants' order. (*Alder v. Savill*, 5 Taunt. 454.)

But the courts have no power to amend so as to introduce a new cause of action, or to make the parties refer what they never consented to refer (*Smurthwaite v. Richardson*, 15 C. B., N. S. 463), and therefore can only make an alteration in an order of reference when it is manifest, that, there has been some omission on the part of the officer, or that, through some accident or mistake, the order is not in accordance with the intention of the parties, and does not in fact embody their agreement. (*Vanderbuhl v. McKenna*, L. R., 3 C. P. 252; *Houghton v. Bankart*, 3 De G., F. & J. 16; 30 L. J., Ch. 182.)

But not so as to introduce new matter.

An order of reference will not be varied upon a suggestion by one party of subsequently discovered matter. (*Drake v. Brown*, 2 C. M. & R. 270.)

The court will often amend an order by striking out terms which have been inadvertently inserted; thus, where a cause was referred upon the usual terms contained in a printed form of, amongst others, "filing no bill in equity," and it being found essential to the justice of the case that a bill should be filed, the condition was erased (*Grimstone v. Bell*, 4 Taunt. 254); and where

Striking out terms inadvertently inserted.

CHAP. VII.

the words "and all matters in difference" were improvidently inserted in a compulsory order of reference, the court struck them out. (*Kendil v. Merrett*, 25 L. J., C. P. 251; but see *Rawtree v. King*, 5 Moore, 167.)

The court will not amend an order of reference, drawn up by one of the parties thereto, upon affidavits by such party that an error was made by him in copying a document attached by consent to the order of reference. (*Wynn v. Nicholson*, 18 L. J., C. P. 231; 7 C. B. 819.) And when a cause had been referred on terms signed by counsel on both sides, but the order drawn up varied from those terms, the parties appearing from their subsequent acts to have been in favour of the terms of the order, the court refused to amend it in accordance with the original terms. (*Pearman v. Carter*, 2 Chitt. 29.) Where the arbitrator awarded a larger sum than that mentioned in the order of reference, and there appeared to be a mistake in the order as to the sum, *semble* that the court would amend the order. (*Hannen v. Jube*, 10 Jur. 926.)

Material
alterations
only by
consent.

If a proposed alteration is a material one, or will introduce new matter, there must be a consent of the parties. (*Cross v. Metcalfe*, 5 A. & E. 800.) When a cause was referred at *nisi prius* without any notice of set-off it was held that a second order could not be made to enable the defendant to give a particular of set-off. (*Ashworth v. Heathcote*, 6 Bing. 596.) In *Morgan v. Tarte* (11 Ex. 82), where a cause was referred to arbitration without power of amendment, it was held that a judge has no power, except by consent of the parties, to order the particulars of demand, specially endorsed on the writ, to be altered by increasing the amount of one of the items; though in an earlier case in the Common Pleas (*Blunt v. Cooke*, 4 M. & G. 458), after several meetings had taken place, the court allowed the plaintiff to amend his particulars by the insertion of other items

in respect of services during the period covered by the former particulars. CHAP. VII.

The court has more extensive powers of amendment over orders for compulsory reference. In such a case, the court may amend the particulars of claim at any time before the award, even though objected to. (*Gibbs v. Knightley*, 2 H. & N. 34; 26 L. J., Ex. 294.) And where a rule for compulsory reference was silent as to costs, and it appeared that the understanding of the officer of the court and of the parties on the drawing up of the rule was that costs would abide the event, and the arbitrator awarded in favour of the plaintiff, the court amended the rule *nunc pro tunc* so as to give effect to the intention of the court when the rule was drawn up. (*Bell v. Postlethwaite*, 5 E. & B. 695; 25 L. J., Q. B. 63.)

Amendment of orders for compulsory reference.

If an order of reference has been improperly drawn up (*Rawtree v. King*, 5 Moore, 167), or obtained by fraud (*Sackett v. Owen*, 2 Chitt. 39), application should be made to set it aside, and not to set aside the award. Where a stranger, who had agreed to join in a submission of a cause, refused to proceed with the reference, the submission was set aside on the application of one of the parties to the cause. (*Bacon v. Cresswell*, 1 Hodges, 189.) And where the plaintiffs had acted with bad faith towards the defendants, and had endeavoured at every step to defeat the object of the reference, a submission was set aside. (*Morgan v. Miller*, 6 Bing. N. C. 168.)

Submission, when set aside.

CHAPTER VIII.

DURATION OF THE ARBITRATOR'S AUTHORITY UNDER
THE SUBMISSION.SECT. 1.—*Enlargement of Time by the Arbitrator or
the Parties.*

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Duration of
arbitrator's
authority
when no time
is fixed for
the award.

THERE should, in every submission, be a certain day named on, or before which, the arbitrator is to make his award, for if there is no limitation of time for making the award there is, in the absence of any statutory provision affecting the submission, no implication that he shall make it within a reasonable time. But if, after the parties request the arbitrator to do so, he neglects to award within a reasonable time, it would be ground for revocation of the submission. (*Curtis v. Potts*, 3 M. & S. 145 ; *Salter v. Yeates*, 5 Dow. 291.)

Three months
under Arbi-
tration Act,
1889.

It was found convenient to provide a limit of time by statute. Section 15 of the C. L. P. Act, 1854, fixed this at three months, where the document of reference contained no different limit. This section, though repealed, is replaced by clause (c) in the first schedule to the Arbitration Act, 1889. So that, in any reference by consent out of court, where no different limit is fixed in the submission, "The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission; or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award."

It is assumed that "arbitrators" includes a single arbitrator where there is only one, and that the powers by the Act given to "arbitrators" are exercisable by a sole arbitrator. Under the Interpretation Act, "words in the singular shall include the plural, and words in the plural shall include the singular." (52 & 53 Vict. c. 63, s. 1.)

The three months only begin to run from the time the arbitrator enters on the reference, and he enters on the reference, not when he accepts the office, or takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he begins the real business of the reference by holding a meeting of the parties, or proceeds under a peremptory appointment *ex parte*. (*Baker v. Stephens*, L. R., 2 Q. B. 523; 36 L. J., Q. B. 236.) And the same construction applies when the matter is referred back and the arbitrator has to enter on the reference *de novo*. (*Ib.*)

If the submission mention a time within which the award must be made, that is a condition that must be strictly complied with unless further time be given. (See Chap. XII., s. 1.)

A submission usually contains, either expressly or by non-exclusion of the statutory power above cited, power for the arbitrator to enlarge the time for making his award. The enlargement must be made during the time previously fixed for making the award.

Where a cause was referred to two arbitrators with power to them to appoint a third, and power for any two of them to enlarge the time, and the two first named enlarged the time before appointing the third, the court held that this was an invalid enlargement, as all three should have been in a position to exercise judgment on the point. (*Reade v. Dutton*, 2 M. & W. 69.)

Clause (c) in the first schedule to the Arbitration Act, 1889, provides that "The umpire shall make his award within one month after the original or extended time

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Case of single arbitrator.

From what time the three months begin to run.

When time fixed award must be withdrawn in it.

Enlargement of time by arbitrator.

By two of three arbitrators.

By umpire.

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appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award."

Previously to this Act, it had been decided, that, if power be given to arbitrators to enlarge the time, and in case of their disagreement they are to choose an umpire, who shall have power to make an award "at the time and in the manner aforesaid," this impliedly gives the umpire power to enlarge the time by his single authority (*Re Vinicombe and Morgan*, 10 L. J., Q. B. 128; 5 Jur. 72); and that the umpire may enlarge the time though the period for entering on his umpirage has not arrived. (*Re Dodington and Bailward*, 5 Bing. N. C. 591.)

Enlargement
after death of
a party.

If the submission provide that the death of either party shall not be a revocation, and contain the usual power for enlarging the time, such power may be exercised after the death of either party. (*Tyler v. Jones*, 3 B. & C. 144; *Clarke v. Crofts*, 4 Bing. 143.)

Mode of
enlargement.

The statutory power of enlargement given to arbitrators is to be executed by "writing signed by them." So also in the case of the umpire. The enlargement may be made "from time to time," as often, and for such a period as may be thought fit. But if the submission give a power of enlargement for a period not exceeding three months from the date of the submission the arbitrator cannot enlarge beyond. (*Denton v. Strong*, L. R., 9 Q. B. 117; 43 L. J., Q. B. 41.)

According to
the terms of
the sub-
mission.

In cases to which the statutory power does not apply, the mode of enlargement by the arbitrator depends entirely upon the terms of the submission. (*Reid v. Fryatt*, 1 M. & S. 1; *Davis v. Vass*, 15 East, 97.) A power to enlarge in some particular way specified in the submission must be strictly pursued. It is generally by endorsement on the agreement or order of reference. (*Leggett v. Finlay*, 6 Bing. 255; *Davison v. Gauntlet*,

1 Dow., N. S. 198.) Where, by an order of reference, a power was given to the arbitrator to enlarge the time for making his award until such ulterior day as he should appoint in writing under his hand, to be endorsed on that order, and the court or a judge thereof should order, it was held necessary to obtain a judge's order ratifying the enlargement. (*Mason v. Wallis*, 10 B. & C. 107.)

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If the arbitrators or umpire fail to exercise the power for enlarging the time, further time may be granted by consent of the parties. This consent should be in writing. The parties may, however, dispense with a formal consent, and if they proceed as if a consent had been given they will be estopped from saying it was not given. (*Tyerman v. Smith*, 6 E. & B. 719; 25 L. J., Q. B. 359.) And the consent of the parties, whether expressed in words, or by attendance, or by any other act recognizing the continuance of the arbitrator's authority, waives the want of a written or formal enlargement, and amounts in effect to a new parol submission. (*Ib.*; *Bennell v. Hinman*, 3 Dow. 500; *Leggett v. Finlay*, 6 Bing. 255; *Palmer v. Metropolitan Rail. Co.*, 31 L. J., Q. B. 259; *Bennett v. Watson*, 29 L. J., Ex. 357; 5 H. & N. 831.) But attending under protest will not be a waiver, though the party contests the case before the arbitrator (*Ringland v. Lowndes*, 17 C. B., N. S. 514; 33 L. J., C. P. 337); nor will a waiver of previous irregularities in enlarging the time imply a consent to make future similar enlargements binding. (*Mason v. Wallis*, 10 B. & C. 107.)

Enlargement
by consent of
the parties.

In the case of statutory references there is usually a limited power of enlargement given to the arbitrators. Thus, the twenty-one days originally allowed for an award may be enlarged to three months under the L. C. C. Act, 1845 (8 & 9 Vict. c. 18, ss. 23, 31), and to two months under the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 180, sub-ss. 8, 9; *Re Yealton*

Enlargement
in case of
statutory
references.

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Local Board, 41 Ch. D. 52; 58 L. J., Ch. 563.) The time may be further enlarged by the consent of the parties. (*Palmer v. Metropolitan Rail. Co.*, *supra*.)

When a stamp necessary.

A written enlargement of time by arbitrators or umpire does not require a stamp, but such an enlargement by the parties does. (*Ante*, p. 47.)

Effect of an informal enlargement.

Where there has been a parol enlargement by the parties, the award, afterwards made, will not be invalid on account of the want of a formal enlargement, but, treating it as made under a parol submission, the court will not enforce it on a summons, but only by action on the award. (*Reade v. Dutton*, 2 M. & W. 69.)

Arbitrator's power to limit time depends on submission.

An arbitrator has no power to limit the time for making an award unless the submission empower him to do so; thus, where the submission limited no time for making the award, but the arbitrators, by a memorandum indorsed on the submission and signed by them but not by the parties, agreed that the award should be made within a certain time, it was held that they had no power to do this, and that an award made after the time was valid. (*Re Morphett*, 14 L. J., Q. B. 259; *ante*, p. 82.)

SECT. 2.—*Enlargement of Time by the Court.*

Power of court to enlarge.

Before the statute 3 & 4 Will. 4, c. 42, s. 39, the court had no power to enlarge the time for making an award by an arbitrator or umpire. This statute, which conferred a power of enlargement upon the court, was supplemented by section 15 of the C. L. P. Act, 1854, both of which have been repealed and replaced by section 9 of the Arbitration Act, 1889. This section enacts that "the time for making an award may from time to time be enlarged by order of the court or a judge, whether the time for making the award has expired or not."

52 & 53 Vict. c. 49, s. 9.

By R. S. C. Order LXIV, r. 14a, "where the time for

making an award is enlarged the enlargement shall be deemed to be for one month unless a different time is specified in the order."

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Enlargement
for a month.

The power of the court to enlarge the time applies in the case of a reference under the L. C. C. Act, 1845 (*Re Dare Valley Rail. Co.*, L. R., 4 Ch. 554; 38 L. J., Ch. 417), and of all statutory references, not expressly excluded (*ante*, p. 72), but the court has refused to exercise its jurisdiction where there had been great delay. (*Ib.*) The court cannot enlarge the time for making an award under the Public Health Act, 1875, beyond the period limited by the Act. (*Re Mackenzie and Ascot Gas Co.*, 17 Q. B. D. 114; 55 L. J., Q. B. 309; *Re Yeaddon Local Board*, 41 Ch. D. 52; 58 L. J., Ch. 563.)

Over what
references
court has
jurisdiction.

The application for an enlargement is properly made by summons in chambers. The order will not be made *ex parte*.

Application
how made.

The exercise of the power of enlargement is discretionary with the court. (*Edwards v. Davies*, 23 L. J., Q. B. 278.) The application must be supported by an affidavit showing "good cause" for the order. Although the "good cause" should be stated in the order for enlargement when drawn up, omitting to state any cause is a mere irregularity which will not invalidate the order. (*Re Burdon*, 27 L. J., C. P. 250.)

Evidence in
support.

The ordinary case in which the order is made is where the arbitrator has no power to enlarge, or, having a power to enlarge, has inadvertently allowed the time to pass without exercising it. (*Parbery v. Newnham*, 7 M. & W. 378; *Leslie v. Richardson*, 6 C. B. 378; 17 L. J., C. P. 324.)

In what cases
order made

The order is not made as of course, and has been refused where no proceedings have been taken for some time under the reference (*Lambert v. Hutchinson*, 10 L. J., C. P. 213; 2 M. & G. 858; *Andrews v. Eaton*, 7 Ex. 221; 21 L. J., Ex. 110; *Dox v. Cannell*, 22 L. J.,

Order refused.

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Q. B. 321); and where the arbitrator, having power to enlarge, has intentionally let the time pass without doing so (*Andrews v. Eaton, supra, per Parke, B.*; and see *Doe v. Powell*, 7 Dow. 539); and where one of the parties has died (*Edwards v. Davies*, 23 L. J., Q. B. 278; *Bowen v. Williams*, 6 D. & L. 235) or become bankrupt. (*Gaffney v. Killen*, 12 Ir. C. L. R., App. 25.)

Court may enlarge though the submission forbid.

Though the submission name a time beyond which no enlargement may be made, the court may enlarge beyond that time. Thus, where the time was limited to a day named, or such further day not exceeding two calendar months from the date of the submission as the arbitrator might appoint, it was held that the court had power to enlarge the time beyond the two months (*Ward v. Secretary of State for War*, 32 L. J., Q. B. 53; 4 B. & S. 442; *Denton v. Strong*, 43 L. J., Q. B. 41; L. R., 9 Q. B. 117); and so where the submission provided that the period to which the time should be enlarged should not exceed the 1st day of July, 1847. (*Parkes v. Smith*, 15 Q. B. 297; 19 L. J., Q. B. 405.)

And after the award is made.

If an arbitrator make his award after the time limited for making it, and no enlargement has been made, the court may enlarge the time (*Broune v. Collyer*, 2 L. M. & P. 470; 20 L. J., Q. B. 426; *Ward v. Secretary of State for War, supra*; *May v. Harcourt*, 13 Q. B. D. 688); and the effect of the order is by relation back to render valid the award and any steps taken between the lapse of the first period and the extended time given by the order. (*Lord v. Lee*, 37 L. J., Q. B. 121; L. R., 3 Q. B. 404.) Though in some instances the award has been remitted back to the arbitrator (*Re Warner and Powell*, L. R., 3 Eq. 261; 15 W. R. 303), this does not seem necessary.

CHAPTER IX.

REVOCATION.

REVOCATIONS are either by express acts of the parties or by operation of law, as by death. CHAP. IX.

There is a common law right in either party to a submission at his caprice to countermand the arbitrator's authority, at any time before the award is made. (*Vynior's Case*, 8 Rep. 81b; *Re Rouse and Meier*, L. R., 6 C. P. 212; 40 L. J., C. P. 145, *per* Willes, J.) The arbitrator is a mandatory, and at any time before the mandate is completed it can be revoked and withdrawn, unless the power of revocation is taken away by Act of Parliament. (*Fraser v. Ehrensperger*, 53 L. J., Q. B. 73; 12 Q. B. D. 310.) Common law right to revoke.

The common law right to revoke the arbitrator's authority exists notwithstanding the submission declares that it shall be irrevocable.

But even at common law, after the submission (whether it were by judge's order, order of *nisi prius*, or agreement containing a consent clause) was made a rule of court, either party revoking the submission would be guilty of, and liable to an attachment for, a contempt. (*Milne v. Gratrix*, 7 East. 608; *Haggett v. Welsh*, 1 Sim. 134; *Green v. Pole*, 6 Bing. 443; *Re Rouse and Meier*, 40 L. J., C. P. 145, *per* Willes, J.) And where the judge's order contained not only the submission of the parties, but directed that either party should under certain circumstances pay to the other "such costs as the court should think reasonable and just," it was held that such an order might be made a rule of court after a revocation, in order to enable the court to dispose Revocation punishable as contempt.

CHAP. IX.

of the question of costs. (*Aston v. George*, 2 B. & A. 395.)

General
agreement to
refer not
revocable.

It is necessary to distinguish between the revocation of an agreement to refer, and the revocation of the appointment of a particular person as arbitrator. Although, at common law, a submission to a particular named arbitrator could be revoked, a general agreement to refer to arbitration could not, any more than any other contract, be revoked. (*Moffat v. Cornelius*, 39 L. T. 102; *Piercy v. Young*, 14 Ch. D. 200; 42 L. T. 710; *Fraser v. Ehrensperger*, 12 Q. B. D. 310; 53 L. J., Q. B. 73; *Re Smith and Nelson*, 25 Q. B. D. 545; 59 L. J., Q. B. 533.) If the agreement was to submit a specific difference to a named person, and the authority of that person was revoked, the agreement was at an end. (*Randell v. Thompson*, 1 Q. B. D. 748; 45 L. J., Q. B. 713; *Deutsche, &c., Gesellschaft v. Briscoe*, 20 Q. B. D. 177; 57 L. J., Q. B. 4.) But if there was a general agreement to refer differences, and afterwards an appointment of an arbitrator to deal with particular differences which had arisen, the appointment of the arbitrator could be revoked by either party, but the agreement to refer continued to exist (*Fraser v. Ehrensperger*, *supra*); and the court could appoint an arbitrator and stay proceedings commenced contrary to the agreement to refer. (*Moffat v. Cornelius*, *supra*.)

No revocation
of appraise-
ment.

There is no power of revocation where the adjudication of the arbitrator is a mere appraisement. So that where by a deed between P., the plaintiffs, and the defendant, P. covenanted with the plaintiffs that he would commence and forthwith build and finish a gas-holder tank, and that the work should be completed on a day mentioned, or, in default, P. should forfeit to the plaintiffs 50l. and 20s. for every day the completion should be delayed beyond that time; and the defendant, as P.'s surety, covenanted with the plaintiffs that P. should perform the covenants on his part, and in default that the defendant

would pay to the plaintiffs such sum as E. should adjudge proper; in an action for not finishing the work, and for not paying the amount which E. had adjudged proper, it was held that E.'s power could not be revoked by any of the parties to the deed. (*Northampton Gas Light Co. v. Paruell*, 15 C. B. 630; 24 L. J., C. P. 60; *Mills v. Bayley*, 32 L. J., Ex. 179; 2 H. & C. 36.)

The common law power of revocation having been much abused, the statute 3 & 4 Will. 4, c. 42, s. 39, was passed.

The effect of this section was to take away from the parties the power to revoke the authority of an arbitrator or umpire whom they had appointed in every case in which the submission contained, either in express terms, or by incorporation (*Re Mitchell and Governor of Ceylon*, 21 Q. B. D. 408; 57 L. J., Q. B. 524), an agreement that it should be made a rule of court. (*Re Smith and Nelson, supra.*)

Power of revocation restricted by 3 & 4 Will. 4, c. 42.

This enactment has been repealed, and in its place it is now provided by section 1 of the Arbitration Act, 1889, that "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of a court or a judge." The section seems to be limited to references by consent out of court, and it applies only to submissions which are in writing.

52 & 53 Vict. c. 49, s. 1.

The language of the new Act is not so exact as that of the old. Its meaning, however, is that when an arbitrator is appointed his authority cannot be revoked by either of the parties except by leave. (*Re Smith and Nelson*, 25 Q. B. D. 545.)

The submission is only irrevocable in the sense in which that phrase was used before the Act, and is to have the same effect as if before the Act it had been made a rule of court. (*Re Smith and Nelson, supra, per Esher, M.R.*)

The Act does not affect revocations by operation of law. The repealed Act was held not to apply when

Matters not within the statute.

CHAP. IX.

the submission was incomplete; so that where arbitrators were appointed in pursuance of a clause in a deed that all disputes should be referred to the arbitration of two persons named, who were directed to choose an umpire before proceeding, but the umpire had not been appointed, it was held revocable. (*Bright v. Durnell*, 4 Dow. 756.) The Act is limited to references of civil proceedings, and when criminal matters are referred the submission is revocable, as at common law. (*R. v. Bardell*, 5 A. & E. 619; *R. v. Shillibeer*, 5 Dow. 238; *R. v. Hardey*, 14 Q. B. 529; 19 L. J., Q. B. 196.)

Applications
for leave to
revoke.

An application to the court, under the statute, for leave to revoke, will be at chambers, by summons, and will not be granted *ex parte*. (*Clarke v. Stocken*, 2 Bing. N. C. 651; 3 Scott, 94.) It must be made before the award has been executed. (*Phipps v. Ingram*, 3 Dow. 669.)

Grounds for.

The power will be exercised with great caution, and only when good grounds are shown. (*James v. Attwood*, 7 Scott, 841; *Re Woodcroft and Jones*, 9 Dow. 538.)

Bankruptcy of
party.

The bankruptcy of one party would probably be ground for a revocation (*Gaffney v. Killen*, 12 Ir. C. L. Rep. (N. S.) App. 25; *Marsh v. Wood*, 9 B. & C. 659);

Misconduct of
arbitrator.

so would corruption in an arbitrator (*Drew v. Drew*, 2 Macq. 1; 25 L. T. 282), or his receiving evidence behind the back of the one party (*ib.*), or two arbitrators appointing an umpire by lot (*Re European and American Steam Shipping Co. and Croskey*, 29 L. J., C. P. 155; 8 C. B., N. S. 397); or if it be shown that the arbitrator is about to exceed his authority (*Fariell v. Eastern Counties Rail. Co.*, 2 Exch. 350; 17 L. J., Ex. 223; *Hart v. Duke*, 32 L. J., Q. B. 55), or does not act. (*Cooper v. Shuttleworth*, 25 L. J., Ex. 114, *per Alderson*, B.)

Bias of the
arbitrator.

The courts regard with jealousy anything like personal interest in an arbitrator, likely to create a bias in his mind. Therefore active litigation between one of the

parties to a submission, and the arbitrator, is ground to revoke a submission, although the litigation arose at a period long subsequent to the date of the submission and in respect of matters unconnected with it. (*Re Baring Brothers and Doulton*, 61 L. J., Q. B. 704.) But where the arbitrator is named in a contract, as for example in a contract for works, the mere fact that the arbitrator is the engineer or servant of one of the parties, is not a ground for revoking the submission, though he may have to decide questions involving his own conduct and skill; the contract of the parties contemplated that he should do so. Leave to revoke will only be given if it is shown that there is a probability that he will be biassed. (*Eckersley v. Mersey Docks and Harbour Board* 1894] 2 Q. B. 667; 71 L. T. 308; *Re Donkin and Leeds Canal*, 9 Times L. R. 192.) But, where a company, after disputes had arisen, claimed to appoint their manager as arbitrator under a policy of insurance, the court held that they must appoint another arbitrator within a week, or the submission would be revoked. (*Re Frankenberg and The Security Co.*, 10 Times L. R. 393.)

It has been held that the admission of evidence by the arbitrator where such evidence is doubtful (*Scott v. Van Sandau*, 1 Q. B. 102), or his refusal to exercise a power to state the grounds on which his decision is founded (*Clarke v. Stocken*, 3 Scott, 94; 2 Bing. N. C. 651), is not a ground for revocation. But the improper admission of evidence which should have been rejected is ground for revocation. (*Re Lord Gerard and London and North Western Rail. Co.* 1894] 2 Q. B. 915; [1895] 1 Q. B. 459; 63 L. J., Q. B. 764; 64 *ib.* 260.)

Arbitrator's decision on points of evidence.

If the arbitrator improperly rejects admissible evidence, the aggrieved party may apply to revoke the submission, and the court will revoke his authority, unless the arbitrator will consent to obey the directions of the court in receiving such rejected evidence. (*Hart v. Duke*, 32

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L. J., Q. B. 55; *Robinson v. Davies*, 49 L. J., Q. B. 218; 5 Q. B. D. 26.) Where an arbitrator is going wrong in point of law, even in a matter within his jurisdiction, the court has power to give leave to revoke a submission; and an arbitrator, having received evidence objected to as tending to vary a written contract, and other evidence, inadmissible in one view of the contract and admissible in another, the House of Lords ordered the revocation unless the parties agreed to the arbitrator stating a special case, showing all the purposes for which he had received, and the effect which he had given to, the different classes of evidence. (*East and West India Dock Co. v. Kirk*, 12 App. Cas. 738; 57 L. J., Q. B. 295.) But in all these cases of an arbitrator going wrong in point of law on a matter within his jurisdiction, the interference of the court is a matter of discretion. (*James v. James*, 23 Q. B. D. 12; 58 L. J., Q. B. 424.)

An applicant cannot set up his own acts as grounds for revocation. (*Re Woodcroft and Jones*, 9 Dow. 538.) Nor will revocation be allowed because some necessary third party will not concur in the reference, unless, at any rate, the submission was conditional upon his concurrence. And, where an action and a chancery suit, were, with the consent of the parties to the action, referred at *nisi prius*, one of the parties to the chancery suit not being a party to the action, and nothing being said when the suit was referred as to obtaining his consent, his refusal to concur was held no ground for revocation. (*Wilson v. Morrell*, 15 C. B. 720; 3 C. L. Rep. 333.)

An appeal from a judge at chambers, giving or refusing leave to revoke a submission, lies to the court of appeal, and not to a divisional court. (*Re Portland District Council and Tilley* [1896] 2 Q. B. 98; 65 L. J., Q. B. 527.)

To make a revocation complete, unless it is by operation of law, notice must be given to the arbitrator. (*Marsh v. Bulteel*, 5 B. & A. 507; *Iynier's Case*, 8 Rep. 81, n.)

Appeal from
decision in
chambers.

Notice of,
must be given
to arbitrator.

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Unless expressly provided to the contrary, the death of either party—where there are only two—to a submission, before the award is made, acts as a revocation of the authority of the arbitrator. (*Cooper v. Johnson*, 2 B. & A. 394; *Tyler v. Jones*, 3 B. & C. 144; *Blundell v. Brettargh*, 17 Ves. 232.) Before the Judicature Act, it was the same where a cause was referred by rule of court or order of *visi prius* (*Rhodes v. Haigh*, 2 B. & C. 345; 3 D. & R. 60; *Potts v. Ward*, 1 Marsh. 366), even where a verdict was taken subject to an award. (*Toussaint v. Hartop*, 7 Taunt. 571.) Now, however, it is assumed that if, after the reference of an action, one of the parties dies, but his personal representatives are substituted under R. S. C. 1883, Order XVII. r. 4, the award would be enforced against them. But where the cause of action is a tort, and after the reference and before award one of the parties dies, his representatives cannot be substituted, as the cause of action is gone. (*Chapman v. Day*, 49 L. T. 436; *Bowker v. Evans*, 15 Q. B. D. 565; 54 L. J., Q. B. 421.) The award is futile.

Death of a party a revocation.

Where the arbitrators were to make and publish their award in writing, ready to be delivered to the parties in difference before a certain day, it was held that the execution of the award in the lifetime of the plaintiff was sufficient to make it valid, though the plaintiff died before notice of it to either party to the reference. (*Brooke v. Mitchell*, 6 M. & W. 473.)

Where the arbitrator is in the position of a person appointed by vendor and purchaser to fix the value and price of an estate sold, the death of either party does not operate as a revocation of the submission. (*Caledonian Rail. Co. v. Lockhart*, 3 Macq. 808.)

It seems very questionable whether an award, after the death of one of several parties on one side of a reference, is void (*Re Harv*, 8 Scott, 367; 8 Dow. 71. *per* Tindal, C.J.), and it will not be so if the submission

Whether death of one of several parties a revocation.

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provide that it may be delivered to the parties or their personal representatives. (*Ib.*; *Harding v. Wickham*, 9 W. R. 652; 4 L. T., N. S. 738.) Without such a provision it seems the death of one of several parties on the same side to a joint and several submission, is not a revocation as to the others. (*Vynior's Case*, 8 Rep. 82, n.) Therefore, where differences arose between the owners of a ship and the freighters (the latter having distinct interests in the cargo), and it was agreed between them that the matters in difference should be referred, it was held that the death of one of the freighters, before award made, only affected the award as to him, and was no revocation as to the others. (*Per* Three Justices, cited 2 Chitt. Arch. 1323, 13th ed.) And where the interest is joint and the cause of action survives, an award made after the death of one and against the survivors might perhaps be good (*Edmunds v. Cox*, 2 Chitt. 435); but it would be bad if made not only against the survivors, but also directing the executors of the deceased to give a release. (*Ib.*; and see *Bristow v. Binns*, 3 D. & R. 184.)

Clause preventing death being a revocation.

It is permissible and usual to insert a clause in a submission or order of reference, where the subject-matter is not a personal tort (*Bowker v. Evans*, 15 Q. B. D. 565; 54 L. J., Q. B. 421), to provide that the death of either party shall not revoke the arbitrator's authority, but that the award, in case of death, shall be delivered to their personal representatives (*Cooper v. Johnson*, 2 B. & A. 394; *Clarke v. Crofts*, 4 Bing. 143; 12 Moore, 349); and in such a case the award will bind the personal representatives (*Dowse v. Cox*, 10 Moore, 273; 3 Bing. 20; *Re Hare*, *supra*; *M'Dougal v. Robertson*, 4 Bing. 435), to the extent of the assets of the deceased in their possession. (*Lewin v. Holbrook*, 2 Dow., N. S. 991; *Prior v. Hembrow*, 8 M. & W. 873.) And when the submission provides that the death of either of the parties

shall not operate as a revocation, the death of one party before the other has an opportunity to examine him as a witness, does not affect the provision. (*Smith v. Fielder*, 10 Bing. 306.)

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Formerly the marriage of a female party to an arbitration after submission, and before award, revoked the arbitrator's authority, as she ceased to have an independent existence, and the arbitrator could not bind her without her husband's concurrence. (*Charnley v. Winstanley*, 5 East, 266; *M'Can v. O'Ferrall*, 8 C. & F. 30.)

Marriage of female party.

This is, however, no longer the case, and a woman after marriage will remain bound by her submissions to arbitration as by her other ante-nuptial contracts. (45 & 46 Vict. c. 75, s. 13.)

Though formerly doubted (*Marsh v. Wood*, 9 B. & C. 659), it seems now established that the bankruptcy of either party to a reference will not of itself operate as a revocation of the submission (*Taylor v. Shuttleworth*, 8 Dow. 281; *Taylor v. Marling*, 2 M. & G. 55; *Hemsworth v. Brian*, 14 L. J., C. P. 134; 1 C. B. 131; *Ex parte Edwards*, 3 Mor. 79); and this whether the submission is by order of court or not. (*Andrews v. Palmer*, 4 B. & A. 250; *Snook v. Hellyer*, 2 Chitt. 43.) The trustees of a bankrupt cannot, however, be compelled to become parties to the reference, nor is the submission binding upon them unless they choose to adopt it. (*Pennell v. Walker*, 26 L. J., C. P. 9; 18 C. B. 651; *Sturgis v. Curzon*, 7 Ex. 17; 21 L. J., Ex. 38.) And, as we have seen, the bankruptcy of the one party will be good ground for an application to the court to revoke. (*Ante*, p. 96.)

Bankruptcy not a revocation.

Even in cases in which a party may be able to revoke the authority of the arbitrator, he cannot, as we have seen (*ante*, p. 94), revoke the instrument of submission, but will remain liable to an action on such instrument.

Revoking party liable an action.

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The remedy for revocation of a submission when not under seal is by action for breach of agreement (*Brown v. Tanner*, M'Cl. & Y. 464; *Warburton v. Storr*, 4 B. & C. 103; 6 D. & R. 213); when the submission is by deed the revoking party is liable to an action on the covenant. (*Milne v. Gratrix*, 7 East, 607; *King v. Joseph*, 5 Taunt. 452.)

No power to
revoke under
the L. C. C.
Act, 1845, &c.

On a reference under the L. C. C. Act, 1845, after the appointment by each party of an arbitrator, neither shall have power to revoke such appointment without the consent of the other, nor shall the death of either party operate as a revocation. (8 & 9 Vict. c. 18, s. 25.) Similar provisions are made with respect to references under the Railway Clauses Act, 1845 (s. 126); the Companies Clauses Act, 1845 (s. 128); the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59, s. 11); and the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 180, sub-s. 3). The Agricultural Holdings Act, 1883, although depriving the parties of the power to revoke the submission, does not prevent a revocation by death of either party. (46 & 47 Vict. c. 61, s. 12.)

CHAPTER X.

THE ARBITRATORS AND UMPIRE.

SECT. 1.—*The Arbitrators.*

UNLESS the reference is under some statute which points out the class of persons from which the arbitrator is to be selected, any person may be appointed arbitrator: and if the parties agree to choose the arbitrator by lot they may do so. (*Re Shaw and Sims*, 17 L. T. 160.) Some of the older authorities except, as incompetent to be arbitrators, infants and lunatics, but if the selection is by mutual consent it is not now probable that disability of any kind in the person chosen, known at the time of appointment, would be ground for impeaching the award, for the parties choose their own tribunal and agree to abide by its decision. (*Ashton v. Poynter*, 3 Dow. 201; *Huntig v. Ralling*, 8 Dow. 879, *ante*, p. 9.) Persons unimpeachable on the score of interest or capacity are usually, and should always be, chosen.

A reference may be to a fluctuating body (*Rathven v. Elgin*, L. R., 2 Sc. App. 535), or to the committee of a trade association, who appoint certain of their number to act. (*Re Keighley and Bryan Durant* 1893 1 Q. B. 405; 62 L. J., Q. B. 105.)

It is no ground for setting aside an award that the arbitrator is a party to the submission, if the other party assented to his appointment; or that he is interested in the matter submitted, provided that, at the time of submission, the objecting party was aware of his interest.

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Who may be
an arbitrator.Fluctuating
body.Persons
interested.

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Secret interest
or bias.

(*Matthew v. Ollerton*, 4 Mod. 226; *Harcourt v. Ramsbottom*, 1 J. & W. 511; *Johnston v. Cheape*, 5 Dow, H. L. 247.)

An arbitrator is, however, in a quasi-judicial position, and in ordinary cases it is a just ground of objection to an arbitrator that he is not indifferent between the parties. (5 H. L. C. 89; *Beddow v. Beddow*, 47 L. J., Ch. 588; 9 Ch. D. 89.) Where it turns out that, unknown to one or both of the parties who submit to be bound by his decision, there are some circumstances in the situation of the arbitrator which tend to produce a bias in his mind, he is an improper person for an arbitrator. (*Kemp v. Rose*, 1 Giff. 265; *Dimes v. Grand Junction Canal*, 3 H. L. C. 759.) Therefore, if the arbitrator has any bad feeling towards one of the parties (*Parker v. Burroughs*, Colles, Parl. Ca. 257), or has any secret interest in the subject-matter of the reference (*Earl v. Stocker*, 2 Vern. 251; *Beddow v. Beddow*, *supra*), or in the success of either of the parties, he is unfit for the position.

Indebted-
ness.

Mere indebtedness to one of the parties will not disqualify a person for being an arbitrator (*Morgan v. Morgan*, 1 Dow. 611; *Malmesbury Rail. Co. v. Budd*, 2 Ch. D. 113; 45 L. J., Ch. 271); and where an arbitrator to whom certain disputed debts between A. and B. had been referred was one of several trustees who had lent part of the trust moneys to A., unknown to B., who, on discovering the fact that A. was insolvent, applied to rescind the submission, it was held that the interest was too remote to warrant the court in rescinding. (*Drew v. Drew*, 2 Macq. 1; 25 L. T. 282.) But where the indebtedness arises directly out of the subject-matter of reference it creates an unfitness. (*Beddow v. Beddow*, 9 Ch. D. 89.)

Bias in arbi-
trators who
have only to
select an
umpire.

Even when the reference is to two arbitrators, one to be chosen by each party, indifferent persons must be selected. Thus, in a reference under the L. C. C. Act,

1845, the appointment of the surveyor of the company is objectionable. (*Re Elliot and South Devon Railway Co.*, 2 De G. & S. 17.) So is the appointment by either side of a person who has been acting as agent in getting up the case. In practice, where the arbitrators are only appointed with a view to their appointing an umpire to act at once, this rule is constantly ignored, and persons who are not "indifferent between the parties" are appointed. Such appointments are imprudent as well as objectionable, and may be impeached by the other side, and may even imperil the award. In a case in which one side appointed their manager as their arbitrator the court threatened to revoke the submission unless a new appointment was made. (*Re Frankenberg and The Security Co.*, 10 Times L. R. 393.) And if biassed arbitrators sit with the umpire his award may be set aside. (*Blanchard v. San Fire Office*, 6 Times L. R. 365.)

If at the time of his selection by the arbitrators, or subsequently and before the award, the umpire acts as a witness on behalf of one of the parties under circumstances which might raise a suspicion of bias on his part, he should either decline to act as umpire or give notice to the parties, so as to allow them either to proceed with the reference, and thus waive the objection, or take steps to revoke the submission (*Re Clout and Metropolitan Rail. Co.*, 46 L. T. 141; *Re Haigh and London and North Western Rail. Co.* [1896] 1 Q. B. 649; 65 L. J., Q. B. 511); though an umpire is not necessarily disqualified on the ground of bias by reason that, pending the reference to him as to the value of land, he has given evidence for one of the parties in another inquiry as to the value of other land taken for the same purpose and under the same powers. (*Ib.*)

Bias in umpire
they select.

When a person, although called an arbitrator, has not quasi-judicial functions to perform, and is, in fact,

Known
interest does
not disqualify.

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appointed, not as an indifferent person, but because he is the agent of one of the parties, it is no objection that he has an interest in the subject-matter of reference. (*Ranger v. Great Western Rail. Co.*, 5 H. L. C. 72; *Hill v. South Staffordshire Rail. Co.*, 11 Jur., N. S. 192.) Such is the common instance of contracts for works, by which the contractor agrees to abide by the decision of the engineer or architect of the employer. (*Scott v. Corporation of Liverpool*, 28 L. J., Ch. 230, 238.) The engineer could not be expected, nor was it intended, that he should come with a mind free from preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party proposed to exact from the arbitrator of their choice. They knew well that he probably must be committed to a prior view, and that he might not be impartial in the ordinary sense. What they relied on was his professional honour, his position, his intelligence. (*Jackson v. Barry Rail. Co.* [1893] 1 Ch. 238; 68 L. T. 472, *per* Bowen, L.J.) It must therefore be shown that there is a reasonable probability that the arbitrator will be biassed towards one of the parties to disqualify him from acting in the matter (*Eckersley v. Mersey Docks and Harbour Board* [1894] 2 Q. B. 667; 71 L. T. 308.) It is not sufficient to show that he will have to decide questions as to his own or his son's skill and competence (*ib.*), or that he will in substance be a judge in his own case (*Ires v. Willans* [1894] 2 Ch. 478; 63 L. J., Ch. 521), or that he has expressed his opinion on the matters in dispute, unless it appears that he has made up his mind so as not to be open to change it on argument. (*Jackson v. Barry Rail. Co.*, *supra*.)

But where there was an unseemly personal dispute between the contractor and engineer, and it appeared

the latter had prejudged the case, that was considered sufficient to disqualify him from acting. (*Nuttall v. Mayor of Manchester*, 8 Times L. R. 513, as explained in *Eckersley v. Mersey Docks and Harbour Board*, *supra*.) Again, a guarantee by the architect to the employer, and not communicated to the contractor, that the cost of a building should not exceed a certain sum, would invalidate his decision upon a claim by the contractor for "extras." (*Kemp v. Rose*, 1 Giff. 258; *Kimberley v. Dick*, 41 L. J., Ch. 38; L. R., 13 Eq. 1; and see *Ludbrook v. Barrett*, 25 W. R. 649.)

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The decision of stewards of a horse race is not invalid on the ground of interest, as, for example, by reason of one of them having made a bet against one of the horses concerned in the dispute. (*Ellis v. Hopper*, 28 L. J., Ex. 1; 3 H. & N. 766.)

Horse stewards.

If a party is aware of any objection to the arbitrator, and yet proceed with the reference without protest, he will be held to waive the objection. (*Re Elliot and South Devon Rail. Co.*, 2 De G. & S. 17; *Re Clout and Metropolitan Rail. Co.*, 46 L. T. 141.) The objection is not waived if the objecting party appear before him under protest. (*Davies v. Price*, 34 L. J., Q. B. 8; *Ringland v. Lowndes*, 33 L. J., C. P. 337; 17 C. B., N. S. 514; *Sheonath v. Ramnath*, 35 L. J., P. C. 1.)

Waiver of objection to arbitrator.

Upon application to the court an injunction will be granted to restrain an arbitrator from acting, on the ground that he is unfit or incompetent. (*Malmesbury Rail. Co. v. Budd*, 45 L. J., Ch. 271; 2 Ch. D. 113; *Beddow v. Beddow*, 47 L. J., Ch. 588; 9 Ch. D. 89.) An application might also be made for leave to revoke the submission. We have seen (*ante*, p. 79) that the court will not generally grant an injunction to restrain an arbitrator from acting on the ground of want of jurisdiction.

Injunction to restrain arbitrator.

Notification to the person chosen, and acceptance by him of the office, are necessary to complete the

Acceptance of appointment.

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appointment of an arbitrator. (*Ringland v. Lowndes*, 15 C. B., N. S. 173; 33 L. J., C. P. 25.)

Requisites of an arbitrator.

It cannot be too strongly impressed upon arbitrators, that the first great requisite in persons occupying that post, is a judicial impartiality and freedom from bias. They should regard themselves as judges (*Harvey v. Shelton*, 7 Beav. 455; 13 L. J., Ch. 466; *Morris v. Reynolds*, 2 Ld. Raym. 857), and bound by the same rigid necessity as the judges of Her Majesty's courts, not only of not being actuated by corrupt and fraudulent motives or partiality, but even of so deporting themselves in every way as to be above the suspicion of being so actuated. "In a matter of so tender a nature," says Lord Hardwicke, "even the appearance of evil is to be avoided."

Removal of arbitrator for misconduct.

It is provided by section 11, sub-section 1, of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), that "where an arbitrator or umpire has misconducted himself the court may remove him." The second sub-section enables the court to set aside the award where the arbitrator or umpire has misconducted himself. This replaces the provision in 9 & 10 Will. 3, c. 15, s. 2, which enacted that an award procured by corruption or undue means should be void.

Corruption or partiality.

Any misconduct of the arbitrator sufficient for setting aside the award would, if discovered before the award is made, be ground for an application to remove him. Under the repealed statute it was decided that if there was ground for imputing to the arbitrator corruption, fraud, or partiality, the award could not stand. (*Steward v. Williamson*, 5 Bing. 415; *Morgan v. Mather*, 2 Ves. 15; *Hutchins v. Hutchins*, Andr. 297; *Tittenson v. Peat*, 3 Atk. 529; *Burton v. Knight*, 2 Vern. 515.) So if he had used strong expressions against either party (*Ward's Case*, cited 2 Atk. 396; *Chicot v. Lequesne*, 2 Ves. sen. 315), or had taken money from one of the

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parties alone, for his charges, before making the award (*Shephard v. Brand*, 2 Barnard. 463); though merely getting an undertaking by one party to take up the award in any event is not misconduct. (*Re Kenworthy and Queen Insurance Co.*, 9 Times L. R. 181.) To purchase the unascertained claims of any of the parties is gross misconduct. (*Blennerhasset v. Day*, 2 Ball & B. 104.) A claim under a policy of insurance was referred to two arbitrators, who appointed an umpire; the three sat together, but the arbitrators differed, and the umpire awarded the claimant £1,200. On it being discovered that before the sittings of the arbitrators the claimant had assigned his interest in the policy to his arbitrator the award was set aside. (*Blanchard v. Sun Fire Office*, 6 Times L. R. 365.)

Buying the claim.

It is improper in an arbitrator to accept hospitality from one of the parties, and if the invitation be given with the intent, or have the effect, of inducing the arbitrator to act unfairly, the court will set aside the award. (*Re Hopper*, 36 L. J., Q. B. 97; L. R., 2 Q. B. 367.) But merely dining or lunching with one of the parties and his witnesses, in the absence of the other, will not in itself invalidate an award (*Ib.*; *Crossley v. Clay*, 5 C. B. 581; *Moseley v. Simpson*, L. R., 16 Eq. 226; 42 L. J., Ch. 739; *Re Maunder*, 49 L. T. 535), and it is said the court will not interfere on the ground of misconduct of the arbitrator on mere suspicion. (*Ib.*)

Accepting hospitality.

It is competent for the parties to agree that the question of fraud or misconduct on the part of the arbitrator shall not be raised by either party. (*Tullis v. Jackson* [1892] 3 Ch. 441; 61 L. J., Ch. 655.)

Agreement not to question conduct of arbitrator.

An application to remove an arbitrator or umpire must be made by motion to a judge in court or to a divisional court, and not by summons in chambers.

Mode of application to remove.

Where, as is commonly the case, each of the two parties to a reference appoints an arbitrator, there

Same obligations on joint

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as on sole
arbitrators.

is a danger of the persons so appointed considering themselves as the agents or tools of their respective appointors, and acting accordingly. This is a highly censurable and dangerous mistake, as it must always imperil the award. Each arbitrator has the same obligations upon him, when more than one are appointed, as if he were the sole arbitrator, and any fraud, corruption, partiality, or bias that would invalidate an award if the arbitrator were acting alone will have the same effect when he awards jointly with another or others, even though the conduct of the others is unimpeachable. (*Burton v. Knight*, 2 Vern. 515; *Fetherstone v. Cooper*, 9 Ves. 67; *Watson v. Duke of Northumberland*, 11 Ves. 153.) Joint arbitrators have no right to act as the advocates of their respective appointors. (*Re Templeman and Reed*, 9 Dow. 962.) In *Oswald v. Grey* (24 L. J., Q. B. 69), Erle, J., observed: "It appears in the present case that each of the arbitrators has considered himself the agent of the party who nominated him. This is a notion which ought strongly to be repudiated, and that it is wrong for an arbitrator so nominated to consider himself appointed to take care of the interests of one party only, and not of the other as well." (And see *Cooper v. Shuttleworth*, 25 L. J., Ex. 114, *per* Bramwell, B.)

Appointment
must be com-
municated to
the other side.

Where differences are referred to two arbitrators, one to be appointed by each party, the appointment on each side will not be complete until notified to the other side. (*Tew v. Harris*, 11 Q. B. 7; 17 L. J., Q. B. 1; *Thomas v. Fredericks*, 10 Q. B. 775; 16 L. J., Q. B. 393.) The appointments should both relate to the same subject-matter, for the arbitrators cannot deal with matters not common to each appointment. (*Davies v. Price*, 10 W. R. 865.)

Joint arbitra-
tors must act
together

On a reference to several arbitrators with no provision that less than all may make an award each must act

(*Little v. Newton*, 2 M. & G. 351; *Stalworth v. Inns*, 13 M. & W. 466; *United Kingdom, &c. Assurance Association v. Houston* 1896 1 Q. B. 567), and all must act together (*Morgan v. Boulton*, 11 W. R. 265; 1 N. R. 271), and every stage of the proceedings must be in the presence of all. (*Re Plews and Middleton*, 6 Q. B. 845; *Peterson v. Ayre*, 23 L. J., C. P. 129; 14 C. B. 665.) Every judicial act to be done by two or more must be completed in the presence of all who do it (*Lord v. Lord*, 26 L. J., Q. B. 34; 5 E. & B. 404; but see *Re Hopper*, L. R., 2 Q. B. 367; 36 L. J., Q. B. 97), and the award must be signed by all at the same time. (*Wade v. Dowling*, 4 E. & B. 44; 23 L. J., Q. B. 302; *Eads v. Williams*, 24 L. J., Ch. 531; 4 De G. M. & G. 674.)

Any objection on the ground of part of the proceedings not being in the presence of all the arbitrators may be waived by the parties going on with the case without objection. (*Re Marsh*, 16 L. J., Q. B. 330; *Moseley v. Simpson*, 42 L. J., Ch. 739; L. R., 16 Eq. 226.)

Where the reference is to three arbitrators, enabling them, or any two of them, to hear the case and make an award, although two have jurisdiction over the case, they must, that their award shall be valid, have given the third notice of the meetings, that he might have attended had he chosen. (*Goodman v. Sayers*, 2 J. & W. 261; *Dalling v. Matchett*, Willes, 215; Barnes. 57.)

When the majority may act.

Where there is no positive refusal, two cannot act without first taking the opinion of the third. If, after discussion, he refuse to concur with them in the award, they may execute it, and it will be good: (*White v. Sharp* 12 M. & W. 712; *Sallows v. Girling*, Cro. Jac. 277; *Re Pering and Keymer*, 3 A. & E. 215; *Re Templeman and Reed*, 9 Dow. 962.) Where there was a reference to three arbitrators with power for any two of them to award, and the award was signed by two only, but

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the only reason the third did not execute it was his absence from home, the execution of the two was held insufficient. (*Re Beck*, 1 C. B., N. S. 695.) Again, in a reference to three arbitrators in which it was provided that any two of them might make an award, a proposed award was shown at a meeting of the three to which one of them objected, and after discussion declared that if the other two would not alter their view they must make the award by themselves. A different draft was afterwards sent by the two to the objecting arbitrator, and he returned it with comments and objections, and eventually the two made an award in the terms originally proposed without again submitting it to the third. The court set it aside, as the other two had not treated the original refusal of the third arbitrator as final, and should have given him an opportunity of discussing his views before finally deciding. (*Re Pering and Keymer*, 3 A. & E. 245; *Re Templeman and Reed*, 9 Dow. 962.)

Parties may appoint a new arbitrator.

The parties may by consent substitute an arbitrator in the place of the one originally appointed; but this will amount to a new submission. (*Re Tunno and Bird*, 5 B. & Ad. 488; *ante*, p. 81.)

Appointment of arbitrator when not named in submission.

In the majority of references of future disputes the arbitrator is not nominated, and in some instances it is left open, as a reference generally, without stating to what number of arbitrators: in others it is expressed to be to a single arbitrator, or to two arbitrators, one to be appointed by each party, or to three arbitrators, one to be appointed by each of the parties, and the third by the two arbitrators so appointed.

Reference to single arbitrator.

Under the Arbitration Act, 1889, in the case of a reference out of court, if no other mode of reference is provided, the reference shall be to a single arbitrator. (52 & 53 Vict. c. 49, sched. 1, cl. (a).)

Power of court to

The same Act makes provision for the court appointing

a single arbitrator where the parties cannot agree upon one. Section 5 enacts that:—

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appoint arbitrator if parties do not.

(a) “Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;”

and also—

(b) “If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy;”

any party may serve the other parties with a written notice to appoint an arbitrator. If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator, who shall have the like powers to act in the reference, and make an award as if he had been appointed by consent of all parties. Provisions to the like effect were contained in section 12 of the C. L. P. Act, 1854.

It is assumed that a submission which provides no contrary mode of reference is by clause (a) in schedule 1 to the Arbitration Act, 1889, within this section. And a reference expressed to be to “an arbitrator or umpire” is tautologous, and means a sole arbitrator. (*Re Eyre and Corporation of Leicester* [1892] 1 Q. B. 136; 61 L. J., Q. B. 438.) In such a case the notice to “appoint” means “concur in appointing,” and is properly so expressed. (*Ib.*) If the conditions exist under which the section is applicable, the court is bound to appoint an arbitrator. (*Ib.*)

If one of the parties dies before an arbitrator is appointed, and his personal representatives refuse to concur in an appointment of an arbitrator, the court has no jurisdiction to appoint one. (*Re Percival*, 2 Times L. R. 150.)

An arbitrator who is temporarily absent from the

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country is not incapable of acting within the section. (*Re Wilson and Eastern Counties Navigation Co.* [1892] 1 Q. B. 81 ; 61 L. J., Q. B. 237 ; and see 8 *Times* L. R. 264.)

The section does not apply except to an arbitration in the strict sense of the term (*ante*, pp. 2, 4.), and not to a mere valuation. (*Bos v. Helsham*, L. R., 2 Ex. 72.) But it does apply in the case of a reference under the Companies Clauses Act, 1845 (*Re Lord*, 24 L. J., Ch. 145 ; 1 K. & J. 90); the Companies Act, 1862 (*De Rosaz v. Anglo-Italian Bank*, 38 L. J., Q. B. 161 ; L. R., 4 Q. B. 462); the Railway Companies Arbitration Act, 1859 (*Re Brazilian Submarine Telegraph Co.*, 42 L. T. 234); and every other Act except in so far as it is inconsistent with such Act. (52 & 53 Vict. c. 49, s. 24.)

Reference to
two arbitra-
tors.

In the second class of cases we have mentioned, viz., a reference to two arbitrators, one to be appointed by each party, the legislature has made provision by which the parties themselves can supply any vacancy. Section 6 of the Arbitration Act, 1889, enacts that "Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

Vacancy in,
supplied by
original
appointor.

(a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;

One party
failing to
appoint, other
party may
appoint his
arbitrator to
act alone.

(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the court or a judge may set aside any appointment made in pursuance of this section."

This is a re-enactment of section 13 of the C. L. P. Act, 1854. Like section 5, it is limited to arbitrations in the proper sense of the term (*ante*, pp. 2, 4), and does not apply where the reference is to more than two arbitrators. (*Gumm v. Hallett*, 41 L. J., Ch. 514; L. R., 14 Eq. 555; *Re Smith and Nelson*, 25 Q. B. D. 545; 59 L. J., Q. B. 533.)

The L. C. C. Act, 1845, makes provision for the remaining arbitrator proceeding in the reference alone when the other arbitrator dies or becomes incapable, and the party whose nominee he was neglects to make another appointment (s. 26); and the same where the arbitrator refuses, or, for seven days, neglects to act (s. 30). Corresponding provisions are contained in the Railways Clauses Act, 1845, the Public Health Act, 1875, and the Railway Companies Arbitration Act, 1859. In a reference under the three former Acts the death of a single arbitrator before he has made his award determines the proceedings, and the arbitration must begin *de novo*.

Vacancy
under the
L. C. C. Act,
1845.

Arbitrators must themselves decide the matters submitted to them, and may not delegate their judicial powers, even to each other (*Lingood v. Eade*, 2 Atk. 505), or agree to accept the decision or opinion of one of their number without exercising any judgment upon it. Even upon a reference to two merchants and a barrister, where the two lay arbitrators agreed to leave a point of law to the *decision* of the legal arbitrator, it was held to invalidate the award. (*Little v. Newton*, 9 Dow. 437.) They might, however, have adopted his opinion as evidence which satisfied their minds upon the point. (See *Eads v. Williams*, 4 De G. M. & G. 687, *per* Lord Cranworth.) Arbitrators cannot without the consent of the parties agree beforehand to be bound by the opinion of a third person without exercising their own judgment

Arbitrator
may not dele-
gate his
authority.

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on the point. (*Whitmore v. Smith*, 7 H. & N. 509; 31 L. J., Ex. 107.) Where an arbitrator made his award "subject to the opinion" of another person, it was held that this was a substituted judgment, and therefore bad. (*Ellison v. Bray*, 9 L. T., N. S. 730.) An arbitrator may, however, adopt the opinion taken from another person as his own. (*Emery v. Wase*, 5 Ves. 846; 8 Ves. 505; *Anderson v. Wallace*, 3 Cl. & F. 26.)

Where, pending a reference, the parties, by a memorandum to which the arbitrator was an assenting party, agreed that a particular portion of the account in dispute should be settled and adjusted by a third person, whose report was to be adopted by the arbitrator as conclusive evidence, it was held that this was not an improper delegation of authority by the arbitrator. (*Sharp v. Nawell*, 6 C. B. 253.)

Mutual concessions by co-arbitrators.

Mutual concessions are often necessary to attain unanimity, and it is no objection to an award that one or both of the arbitrators gave way upon points upon which they originally differed, in order to come to a decision. (*Eardley v. Steer*, 4 Dow. 430.) But if one arbitrator, in concession to his co-arbitrator, awards contrary to his own judgment, it will be bad. (*Eads v. Williams*, 4 De G. M. & G. 688.)

SECT. 2.—*The Umpire.*

When an umpire may be appointed.

When two arbitrators are appointed, and nothing to the contrary appears in the instrument of reference, an umpire may be chosen. It is usual to make provision for his appointment in the submission, and in such case the nomination may either be by the parties themselves at the time of submission, or may be left to the arbitrators. In the latter case, the appointment is often made a condition precedent to the arbitrators entering

on the reference (*Bright v. Durnell*, 4 Dow. 756; *Re Hick*, 8 Taunt. 694), in which event, no valid step can be taken in the arbitration until it is done. But merely enlarging the time before appointing an umpire is not an entering on the reference so as to render the appointment null. (*Cudliff v. Walters*, 2 M. & R. 232.)

Sometimes the person to be appointed is not an umpire, but a third arbitrator. It is necessary to distinguish between an umpire, whose duties only commence when those of the arbitrators have ended, and a third arbitrator, whose duties commence at once. (*Re Smith and Nelson*, 25 Q. B. D. 545; 59 L. J., Q. B. 533; *United Kingdom, &c. Assurance Association v. Houston* [1896] 1 Q. B. 567.) Until he is appointed the other two cannot act, even to the extent of enlarging the time. (*Reade v. Dutton*, 2 M. & W. 69.) It is not always clear whether the person to be appointed is an umpire or third arbitrator. Where there was a reference to two persons, with power for them to appoint an umpire, and an agreement to obey the award of the two *and* their umpire, it was considered doubtful whether the third person was not an arbitrator so as to require the award to be made by all. (*Hetherington v. Robinson*, 4 M. & W. 608.) But a submission to two, with power for them, if they should not agree, to appoint a third person "to be umpire in or to concur and join with them in considering and determining all or any of the matters referred," was held to make the third person an umpire. (*Winteringham v. Robertson*, 27 L. J., Ex. 301.) And if the two arbitrators, with the acquiescence of the parties, treat the third arbitrator as an umpire, the award will not be open to objection on that account. (*Re Marsh*, 16 L. J., Q. B. 330; *Peterson v. Ayres*, 23 L. J., C. P. 129; 14 C. B. 665; *Moseley v. Simpson*, L. R., 16 Eq. 226; 42 L. J., Ch. 739.)

Umpire
or third
arbitrator.

In the case of a reference by consent out of court,

When the
arbitrators

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may appoint
umpire.

unless a contrary intention is expressed in the submission, "if the reference is to two arbitrators the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award." (52 & 53 Vict. c. 49, s. 2, sched. 1, cl. (b).) This in substance embodies the repealed section 14 of the C. L. P. Act, 1854.

When court
may appoint.

Section 5 of the Arbitration Act, 1889, in addition to giving the court power to appoint in the case of a reference to a single arbitrator (*ante*, p. 112), provides as follows:—

- (c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;
- (d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy ;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an umpire or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice the court or a judge may appoint. (See p. 113.)

These provisions, like the other provisions of the Act, are restricted to arbitrations properly so called (*ante*, pp. 2, 4), but they apply to statutory references. (*Ex parte McBryde*, 4 Ch. D. 200 ; 46 L. J., Ch. 153 ; *Re Lord*, 1 K. & J. 90, *ante*, p. 114.)

Submission to
three arbitra-
tors no power
to compel
party to
appoint.

Where there is a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator, the court has no power to order him to do so, or to appoint an arbitrator in default of his appointment. (*Re Smith and Nelson*, 25 Q. B. D. 545 ; 59 L. J., Q. B. 533.)

In a reference to two or more arbitrators under the L. C. C. Act, 1845, the arbitrators must, before entering upon the reference, appoint by writing an umpire to decide matters on which they shall differ, or which may be referred to him under the provisions of the Act; and if he die they should forthwith appoint another. (Sect. 27; and see *Shepherd v. Corporation of Norwich*, 30 Ch. D. 553; 54 L. J., Ch. 1050.) If the arbitrators refuse or for seven days after request neglect to appoint an umpire, the Board of Trade are to appoint an umpire, and the decision of such umpire on the matters in which the arbitrators differ, or which are referred to him under the Act, is final. (Section 28; and see 46 & 47 Vict. c. 15.) The Railways Clauses Act, 1845, and the Railway Companies Arbitration Act, 1859, contain corresponding provisions. The latter, however, makes provision in case the umpire neglect or refuse to act (22 & 23 Vict. c. 59, ss. 14—16), which the two former do not. The Public Health Act, 1875, also requires the appointment of an umpire where there is more than one arbitrator. If the arbitrators neglect or refuse to make the appointment, it may be made by the Local Government Board.

The appointment of an umpire must be signed by both arbitrators at the same time or in each other's presence, or the appointment will be invalid (*Lord v. Lord*, 26 L. J., Q. B. 34; 5 E. & B. 404); unless they have previously decided upon the umpire, and the signing is a mere record of their decision. (*Re Hopper*, 36 L. J., Q. B. 97; L. R., 2 Q. B. 367.)

Where the umpire is to be appointed by the arbitrators, he may, as we have seen (*ante*, p. 118), be appointed at any time within the period during which they have power to make an award. He may, in general, be appointed by them before they enter upon the reference, even although the submission give power to appoint only in case of their disagreeing. (*Bates v. Cooke*,

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Appointment in a reference under the L. C. C. Act, 1845.

Appointment must be by both arbitrators at the same time.

At what time the umpire may be appointed.

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Appointed by arbitrators after their other powers are spent.

Although the power of arbitrators to make an award is determined at the end of twenty-one days unless the time is extended, both under the L. C. C. Act, 1845, and the Public Health Act, 1875, it was held that they may appoint an umpire at any time within the time limited for the umpirage. (*Bradshaw's Case*, 17 L. J., Q. B. 362; 12 Q. B. 562; *Holdsworth v. Wilson*, 32 L. J., Q. B. 289; 4 B. & S. 1.) These decisions were, however, before the Arbitration Act, 1889, and it may be questioned, whether under section 24 of that Act, the requirement of clause (b) in the first schedule to the Act does not apply so as to limit the power of appointment to the time during which the arbitrators have power to make an award.

It was decided under the L. C. C. Act, 1845, that the umpire's time begins to run from the date when the arbitration devolves upon him. (*Skerratt v. North Stafford. Rail. Co.*, 2 Ph. 475; *Re Pullen and Corporation of Liverpool*, 46 L. T. 391; 51 L. J., Q. B. 285.)

Appointment must not be by lot.

The appointment must be a matter of choice, and not of chance (*Re Cassell*, 9 B. & C. 624; *Ford v. Jones*, 3 B. & Ad. 248); so that where arbitrators, being unable to agree upon a proper person to appoint, agreed to cast lots *which should have the nomination*, the appointment was held bad. (*Wells v. Cooke*, 2 B. & A. 218; *Young v. Miller*, 3 B. & C. 407; *Harris v. Mitchell*, 2 Vern. 485.) The assent of the parties, given with a full knowledge of all the attendant circumstances to such an appointment, may make it valid. (*Re Hodson and Drewry*, 7 Dow. 569; *Re Tunno and Bird*, 5 B. & Ad. 488.) But neither attending meetings before an umpire so chosen (*Wells v. Cooke*, 2 B. & A. 218), nor assenting to the umpire chosen, without knowing the mode of choice (*Re Greenwood*, 9 A. & E. 699), nor, even knowing the mode of choice, but not knowing that the person chosen had

before casting lots been objected to by one of the arbitrators (*Re Jamieson*, 4 A. & E. 945), will prevent one of the parties from taking the objection to the appointment. A solicitor or agent (*Backhouse v. Taylor*, 20 L. J., Q. B. 233; *Re Blyth and Tyne Rail. Co.*, 11 W. R. 705)—but not the solicitor's clerk (*Re Hodson and Drewry*, 7 Dow. 569)—has power to consent to an appointment by lot.

Where each arbitrator named an umpire whom the other thought a proper person, and, not being able to decide which of the two proposed should be selected, they agreed to decide the choice by lot, the appointment was held good, for as each arbitrator admitted the fitness of the person proposed by the other, the one chosen was in fact the nominee of both. (*Neale v. Ledger*, 16 East, 51; *Re Hopper*, 36 L. J., Q. B. 97; L. R., 2 Q. B. 367.) But such an appointment would be bad if one of the arbitrators did not know the person appointed, and was without the means of judging of his qualifications (*Re European and American Steam Shipping Co.*, 29 L. J., C. P. 155; 8 C. B., N. S. 397; *Pescod v. Pescod*, 58 L. T. 76); and it must always be made out clearly that the person chosen was not objected to by either arbitrator. (*Morgan v. Boulton*, 11 W. R. 265; and see *Re Vinicombe and Morgan*, 10 L. J., Q. B. 128.)

Unless the person named as umpire accept the appointment, the arbitrators may appoint another person. (*Trippet v. Eyre*, 3 Lev. 263; 5 Mod. 457; *Reynolds v. Gray*, 1 Salk. 70; 12 Mod. 120; 2 Saund. 133 a.) But a regular appointment of an umpire who *accepts* the appointment cannot be revoked or affected by the subsequent dissent of the parties. (*Oliver v. Collings*, 11 East, 367.)

Appointment of another if first refuse to act.

If the submission indicate the mode of appointing an umpire, or the reference is under a statute, the directions of the submission, or the provisions of the statute must be followed; when no mode of appointment is

Mode of appointment.

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prescribed it may be by parol. (*Oliver v. Collings*, 11 East, 367.)

Stamp not necessary.

The appointment of an umpire need not be stamped (*Routledge v. Thornton*, 4 Taunt. 704) unless it be by deed.

Commencement of umpire's powers.

In the case of a submission by consent out of court, where an umpire has been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators if the latter shall have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree. (Arbitration Act, 1889, sched. 1, cl. (d); in substance re-enacting C. L. P. Act, 1854, s. 15.) Independently of this enactment the authority and powers of an umpire only arise when the arbitrators have disagreed, or when they have allowed the time for their award to pass without agreeing, or neglecting to agree. He may make his umpirage at any time before the expiration of the time limited for that purpose by the submission; he may do so even before the expiration of the time limited for the arbitrators making their award (*Sprigens v. Nash*, 5 M. & S. 193; *Smailes v. Wright*, 3 M. & S. 559), only defeasible in the event of the arbitrators, within the time limited for them, agreeing upon an award. (*Ib.*)

What is a disagreement of the arbitrators.

If one arbitrator requires more evidence to be laid before him and the other does not, this is a sufficient disagreement to warrant the appointment or interference of the umpire, when it has been agreed that such shall take place upon the arbitrators disagreeing. (*Cudliff v. Walters*, 2 M. & Rob. 232.) And, as a general rule, non-agreement is "disagreement." (*Re Doddington and Bailward*, 8 L. J., C. P. 331; 7 Dow. 640; *Winteringham v. Robertson*, 27 L. J., Ex. 301.)

Umpire must decide between the

The duty of the umpire, when he acts, is to decide upon the whole of the matters in difference between the parties,

and not upon particular points upon which the arbitrators are unable to decide (*Tollit v. Saunders*, 9 Price, 612; *Wicks v. Cox*, 11 Jur. 542; *Greene v. Bracken*, 2 Ir. C. L. Rep. 176; *Winteringham v. Robertson*, *supra*; Com. Dig. "Arb." F.), unless, as is sometimes the case, there is an express provision for that purpose in the submission (*Lang v. Brown*, 25 L. T. 297), or in the statute providing for the reference, as in the L. C. C. Act, 1845.

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parties, and
not between
the arbitra-
tors.

Where there was a submission to two arbitrators, and, in the event of their differing in opinion, to any umpire they might appoint, "and whatever the arbitrators or umpire shall determine in the premises by an award or awards, interim or final, to be pronounced by them" within a certain time, it was held in the House of Lords, upon the construction of the document, that the arbitrators were not bound to decide everything themselves, or send everything to the umpire, but that they could decide part, and leave matters upon which they could not agree to the umpire. (*Lang v. Brown*, *supra*.)

The umpire must make his umpirage within the time limited by the submission. (*Re Swinford*, 6 M. & S. 226.) If no time is limited, then within one month after the original or extended time for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award. (Arbitration Act, 1889, sched. 1, cl. (e).)

Duration of
umpire's
authority.

The court has power to enlarge the time of an umpire for making his award. (*Re Johnson and Collie*, 24 L. J., Q. B. 63.)

Enlargement
of time by
court.

When acting, the umpire has the same powers and rights, and is bound by the same rules, as the arbitrators. (*Bean v. Newbury*, 1 Lev. 139; *Re Salkeld and Slater*, 12 A. & E. 767; *Re Jenkins*, 1 Dow., N. S. 276; *Waltonshaw v. Marshall*, 1 H. & W. 209; *Matson v.*

Powers and
duties of the
umpire.

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Rehearing the
evidence.

Trower, R. & M. 17.) If, as is often the case, he sits with the arbitrators to hear evidence, he should take no part in their discussions or impede their coming to an agreement. (*Flag Lane Chapel v. Mayor of Sunderland*, 5 Jur., N. S. 894.) When he does not sit with the arbitrators he should re-examine the witnesses, and not decide upon the notes of the arbitrators (*Re Jenkins*, *supra*); but it has been held competent for the umpire to receive the evidence from the arbitrators when the parties expressly consent to his doing so (*Re Firth and Howlett*, 19 L. J., Q. B. 169), or, knowing that he is about to do so, make no objection (*Hall v. Lawrence*, 4 T. R. 589; *Re Tunno and Bird*, 5 B. & Ad. 488), or otherwise waive the right. If either of the parties request him to examine the witnesses, and he refuse, the court will set aside his umpirage. (*Re Salkeld and Slater*, 12 A. & E. 767.) So, if he refuse to receive further evidence besides that which was given before the arbitrators, his umpirage will be bad, and the court will set it aside, and the fact of one of the parties having taken it up will be no waiver of the objection. (*Re Jenkins*, 1 Dow., N. S. 276; 11 L. J., Q. B. 71.)

Mercantile
usage.

Mercantile usages in the conduct of references cannot be supported if contrary to the principles of justice. So that where a mercantile contract provided that disputes should "be settled by arbitration in London in the usual way," and evidence was given by merchants engaged in that trade, that it was the usual and ordinary practice in mercantile arbitrations for an umpire, in case he sees fit, to inspect samples produced on behalf of one of the parties without any communication with the other, to communicate directly with witnesses without notice to the parties, and to make his award without giving the parties or their arbitrators an opportunity of being heard, it was held that such a usage, as tending to allow parties to be decided against without being heard, was contrary to the

principles of justice and law, and that the award of an umpire who had followed this usage was bad. (*Re Brook*, 33 L. J., C. P. 246; 16 C. B., N. S. 403; but see *Matson v. Trower*, R. & M. 17.)

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Where the reference is to two persons and their umpire as experts, it is no objection to the decision of the umpire that he acts by applying his expert knowledge to the statement of facts of the arbitrators without examining witnesses (*Bottomley v. Ambler*, 38 L. T. 545; 26 W. R. 566); but even in such a case the parties, if they desire it, and make known their desire before the umpire makes his award, are entitled to be heard in the ordinary way. (*Re Maunders*, 49 L. T. 535.)

Reference to experts.

If the arbitrators join the umpire in his umpirage it is mere surplusage, and will not vitiate the instrument. (*Bates v. Cooke*, 9 B. & C. 407; *Beck v. Sargent*, 4 Taunt. 232; *Soulsby v. Hodgson*, 1 W. Bl. 463.)

Arbitrators joining in the umpirage mere surplusage.

Before an arbitrator or umpire shall enter into the consideration of any matters referred to him under the L. C. C. Act, 1845, or the Railways Clauses Act, 1845, he must, in the presence of a justice of the peace, make a declaration in the form given in those Acts (8 & 9 Vict. c. 18, s. 33; 8 & 9 Vict. c. 20, s. 134); and such declaration shall be annexed to the award when made. A similar provision is contained in the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 180), and in other statutes providing for references.

Declaration by arbitrators and umpire in statutory references.

SECT. 3.—*Remuneration of Arbitrators—Their Liability for Misconduct.*

An arbitrator is at liberty to fix his own charges, and it is usual for him to do so. (*Threlfall v. Fanshawe*, 19 L. J., Q. B. 334.) But he should not state the amount in his award, although authorized to do so by the submission, since, if excessive, the award might be questioned.

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Arbitrator
cannot sue for
his fees.

His lien.

In the absence of an express promise by the parties to the reference to pay, a legal arbitrator cannot recover his charges by action (*Virany v. Warne*, 4 Esp. 47; *Burroughes v. Clarke*, 1 Dow. 48; *Hoggins v. Gordon*, 11 L. J., Q. B. 286; 3 Q. B. 466), though it was held in the reference of a mercantile dispute to lay arbitrators and their umpire that there is an implied contract to pay reasonable remuneration for their services. (*Crampton v. Ridley*, 20 Q. B. D. 48; 36 W. R. 554; *Willis v. Wakeley*, 7 Times L. R. 604.) The arbitrator has, however, a lien upon the award and submission (but not upon documents put in evidence before him (*Ponsford v. Swaine*, 1 J. & H. 433)), and may retain them until his charges have been paid. The usual practice, therefore, is for the arbitrator to notify to the parties the amount of his charges, and to refuse to deliver the award or communicate its contents until they are paid. This obviates all disputes, and the practice has received repeated judicial sanction. (*Roberts v. Eberhardt*, 28 L. J., C. P. 74; 6 W. R. 170.) And he is justified in so doing, even where the reference is under the L. C. C. Act, 1845. (*R. v. South Devon Rail. Co.*, 15 Q. B. 1043; 20 L. J., Q. B. 145; *Ex parte Harper*, 23 W. R. 67.) The fees payable to legal arbitrators are well known in the profession, and are sanctioned by the masters on taxation.

If the arbitrator is also appointed receiver, he may retain his fees out of the funds coming into his possession. (*Roberts v. Eberhardt*, *supra*.)

If each party be ordered to pay a moiety of the arbitrator's charges, one of them may pay the entire sum in order to get the award from the arbitrator, and may afterwards have the same remedy against the other, if he refuse to pay his moiety, as he would have for the non-performance of any other part of the award. (*Hicks v. Richardson*, 1 B. & P. 93; *Marsack v. Webber*, 6 H. & N. 1.)

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Though an arbitrator may fix his own charges, he is not at liberty to fix an exorbitant sum. If he does so, and a party in order to take up the award is obliged to pay or pays involuntarily such unreasonable amount, he may recover the overcharge by action for money had and received, for, the money being extorted under a species of duress of property contrary to the law, an action lies to recover the excess. (*Fernley v. Branson*, 20 L. J., Q. B. 178; *Re Coombs*, 4 Exch. 839; *Barnes v. Braithwaite*, 2 H. & N. 569.) But the courts have no summary jurisdiction over an arbitrator to compel him to submit his costs to taxation (*Withington v. Wrexham Waterworks Co.*, 32 W. R. 1000) or to compel him by attachment to refund the amount received by him beyond what is allowed on taxation. (*Dossett v. Gingell*, 2 M. & G. 870; 10 L. J., C. P. 183.) If one of the parties has paid an excessive claim for the arbitrator's charges on taking up the award, and he is entitled to the costs of the award, he is not entitled to recover from the opposite party more than a reasonable sum for the arbitrator's fee, and the master on taxation between party and party may tax off the excess. (*Fitzgerald v. Graves*, 5 Taunt. 342; *Roberts v. Eberhardt*, 28 L. J., C. P. 74; *Webb v. Wgatt*, 5 W. R. 570.) In such a case the party must resort to his remedy by action against the arbitrator to recover the difference between the amount paid and the amount allowed on taxation. (*Barnes v. Hayward*, 1 H. & N. 742.)

Excessive charges by arbitrator recovered back by action.

It has not been expressly decided what are the rights of a party to recover from the arbitrator charges paid in order to take up an award which is afterwards set aside for a gross mistake of the arbitrator. (But see *Re Hall and Hinds*, 2 M. & G. 847, 853, n.)

When an award is made by an umpire on the disagreement of the arbitrators, or on their failing to award, he is entitled to charge the fees due to the arbitrators as

Costs of umpirage.

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part of the costs of umpirage. (*Ellison v. Ackroyd*, 20 L. J., Q. B. 193.) If the umpire fail to charge them, the party who has paid the arbitrators' fees will be entitled to have the amount allowed him among the other costs of the reference.

Action against
arbitrator for
misconduct

It has been said that an arbitrator is liable to an action if he misconduct himself (*Wills v. Macearmick*, 2 Wils. 148; and see *Moore v. Foster*, Yelv. 62); though there does not seem to be any instance of such an action. But, where, under a building contract, the certificate of an architect that he was satisfied, was a condition precedent to payment, it was held that an action would lie against the architect for a fraudulent refusal to certify. (*Ludbrook v. Barrett*, 25 W. R. 649; 46 L. J., C. P. 798.)

Wilful misconduct in an arbitrator appointed under the L. C. C. Act, 1845, or the Railways Clauses Act, 1845, is a misdemeanor. (8 & 9 Vict. c. 18, s. 33; 8 & 9 Vict. c. 20, s. 134.)

Negligence
or unskilful-
ness.

If an arbitrator act honestly, an action will not lie against him for want of skill or care, or for negligence in performing his duties. (*Pappa v. Rose*, 41 L. J., C. P. 187; L. R., 7 C. P. 525; *Tharsis Sulphur and Copper Co. v. Loftus*, 42 L. J., C. P. 6; L. R., 8 C. P. 1; *Sterenson v. Watson*, 48 L. J., C. P. 318; 4 C. P. D. 148.) Even a person who is not an arbitrator in the strict sense of the term, but undertakes to conclude a disputed fact left to his decision, is not liable to such an action. But a mere valuer, who has held himself out as such for reward, is liable. (*Turner v. Goulden*, 43 L. J., C. P. 60; L. R., 9 C. P. 57; *Jenkins v. Betham*, 24 L. J., C. P. 94; 15 C. B. 168.)

Arbitrator
made defen-
dant in pro-
ceedings to
impeach an
award.

Under the practice of the old courts of equity it was a rule that in general an arbitrator could not be made a party to a bill for the purpose of impeaching an award. In some cases, nevertheless, where an award was impeached on the ground of gross misconduct in the

arbitrators, and they were made parties to the suit, the court ordered them to pay the costs. (*Chicot v. Lequesne*, 2 Ves. sen. 315; *Lingood v. Croucher*, 2 Atk. 395; *Hamilton v. Bankin*, 3 De G. & S. 782; see, *per* Jessel, M.R., *Mathias v. Yetts*, 46 L. T. 502.) But now, it is not proper to make an arbitrator a party to an action simply for the purpose of asking for costs, if no other relief is sought against him. (*Amos v. Herne Bay, &c. Co.*, 54 L. T. 264; *Burstall v. Beyfus*, 26 Ch. D. 35; 53 L. J., Ch. 565.)

SECT. 4.—*When an Arbitrator may be called as a Witness.*

An arbitrator may often be called as a witness to prove facts which occurred or came under his notice during the reference. (*Roberts v. Corbett*, 20 L. T. 66.) He cannot, however, be admitted, or called upon, to give evidence of any concessions made by one party during the reference for the purpose of bringing peace and getting rid of a suit, but there is no objection to his proving regular admissions made by the parties in the course of the proceedings. (*Westlake v. Collard*, Bull. N. P. 230; *Slack v. Buchanan*, Peake, N. P. C. 6; *Gregory v. Howard*, 3 Esp. 113.) And an abstract furnished by one party before an arbitrator was admitted as evidence in a future suit, in a court of law, against the same party. (*Doe v. Evans*, 3 C. & P. 219.) But an arbitrator cannot be allowed, in a subsequent trial of the same cause of action, to prove the result of an examination of the parties, or of an inspection of their books, pending a reference to him. (*Habershon v. Troby*, 3 Esp. 38.)

Arbitrator competent witness as to facts of the reference.

The evidence of an arbitrator is also admissible to show in respect of what matters he exercised jurisdiction.

And to show over what matter he

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exercised
jurisdiction.

(*Duke of Buccleuch v. Metropolitan Board of Works*, 39 L. J., Ex. 130; 41 L. J., Ex. 137; L. R., 5 Ex. 221; 5 H. L. 418.) “Any attempt to annoy an arbitrator, by asking questions to show that he had mistaken the law, or found a verdict against the weight of evidence, should be checked, for these matters are irrelevant. But where the question is whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give evidence on that matter than he.” (*Ib.*, per Blackburn, J., 39 L. J., Ex. 138.) In that case the House of Lords held the arbitrator’s evidence admissible to show whether he had adjudicated upon matters not within his jurisdiction. Hart, L. C. of Ireland, had expressed an opinion in an earlier case of *Brophy v. Holmes* (2 Molloy, 1), that though an award was good on the face of it, and purported to be an adjudication on all matters in difference brought before the arbitrators, the arbitrators themselves might be examined whether they did in fact exercise the jurisdiction, and include in their consideration as matters in difference certain matters brought before them. In *Re Rhys and Dare Valley Rail. Co.* (37 L. J., Ch. 719; L. R., 6 Eq. 429) the evidence of an arbitrator was held admissible, upon a motion to set aside an award, to show whether he had mistakenly awarded on wrong subject-matter, or made a mistake in legal principle going directly to the basis on which the award was founded; though, in an old case, the court refused to allow the arbitrator to be called to give such evidence as would in fact contradict his award, the terms of the award being clear. (*Shelling v. Farmer*, 1 Str. 646.)

But not as
to his reasons
for his award.

An arbitrator cannot be examined as to the mental process by which he arrived at his award in respect of matters within his jurisdiction. (*Duke of Buccleuch v. Metropolitan Board of Works*, *supra*; *Ellis v. Saltan*, 4 C. & P. 327, n.)

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The above rules apply to actions upon the award in which the rules of evidence are to be observed. Upon an application to set aside or remit an award, on the ground of mistake or misconception of the arbitrator, the court to which the application was made would probably reject no means of informing itself whether the arbitrator had proceeded upon such mistake or misconception. (*Duke of Buccleuch v. Metropolitan Board of Works*, *supra*, per Cleasby, B. ; and see *post*, Chap. XV.)

An arbitrator may be called to prove that certain matters were not included in matters referred (*Race v. Farmer*, 4 T. R. 146) ; or that a specific claim was not made before him. (*Martin v. Thornton*, 4 Esp. 180.) And he may be asked whether he was requested by either party to find on specific issues, he being authorized to award generally unless so requested. (*Wilson v. Hinckley*, 18 L. T., N. S. 695.)

The notes of evidence taken by an arbitrator are his own, and the court has no power to compel the production of them, or deal with them, any more than with a judge's minutes. (*Scougull v. Campbell*, 1 Chitt. 283.)

It is a well understood rule of the profession, approved by the courts, that a barrister should decline to make an affidavit respecting his conduct as an arbitrator. (*Dobson v. Groves*, 6 Q. B. 637 ; *Doe v. Preston*, 3 D. & L. 768.)

When arbitrator a barrister.

CHAPTER XI.

PROCEEDINGS BEFORE THE ARBITRATOR.

SECT. 1.—*Preliminaries.*

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Procuring an
appointment
for the
hearing.

THE arbitrator having consented to undertake the office, one of the parties should apply to him for a written appointment of a day for hearing the case. It is usual to try and arrange a day convenient for all the parties.

Where several arbitrators are appointed, they should all concur in naming a day, unless the submission empowers the majority to award, in which case the majority may appoint a reasonable time, and, if the others do not attend after notice of such appointment, may proceed in their absence. (*Goodman v. Sayers*, 2 J. & W. 261.) Absenting arbitrators should have notice of every meeting.

The submission, or order of reference, should be left with the arbitrator, that he may know the duties he has to perform and the powers with which he is invested.

Power of
arbitrator as
to the pro-
ceedings.

Subject to the obligation to conduct it as nearly as may be like a trial before a judge (*infra*, p. 138), the mode of conducting a reference lies almost wholly in the discretion of the arbitrator. Like other judges, however, he is bound to observe in his proceedings the ordinary rules laid down for the administration of justice. (*Re Haigh's Estate*, 31 L. J., Ch. 420; 3 De G., F. & J. 157.) He appoints the times and places of meeting and adjournment, but they must be reasonable, and notice thereof

Appointment
of meetings.

must be given to both parties, or the award will be void (*Oswald v. Grey*, 24 L. J., Q. B. 69; *Hobbs v. Ferrars*, 8 Dow. 779; *Anon.*, 1 Salk. 71); but if nothing is done, except to adjourn, at a meeting of which no notice is given to one party, the award will not be bad. (*Re Morphett*, 2 D. & L. 967.) The arbitrator may revoke an appointment, or insist upon it notwithstanding it may be inconvenient for one of the parties to attend (*Eastham v. Tyler*, 2 B. C. Rep. 136); nor, is it any ground for removing an arbitrator, that he refuses to alter the date appointed, to an earlier date, because the principal witness of one of the parties is going abroad before the date fixed (*Re Whitwham and Wrexham Rail. Co.*, 39 Sol. J. 692), or, to set aside an award, that the solicitor of one of the parties says he cannot attend at the time the arbitrator appoints; he must attend if the time is reasonable, and, failing, the arbitrator may proceed in his absence. (*Fetherstone v. Cooper*, 9 Ves. 67.) It is usual to consult the convenience of both parties in fixing the day.

When one party is about to employ counsel, it is his duty to give notice thereof to the opposite party, to enable him to do likewise. (*Whatley v. Morland*, 2 Dow. 249.) In exercise of the power which an arbitrator has of regulating the proceedings before him (see *Collier v. Hicks*, 2 B. & Ad. 672), he can refuse to allow the parties to be represented by advocates, and may, in his discretion, refuse to hear counsel (*Re Macqueen*, 9 C. B., N. S. 793), or solicitors. It is only usual for one counsel to attend on each side, but in cases of difficulty more than one on each side may attend, and their fees will be allowed on taxation of costs. (*Sinclair v. Great Eastern Rail. Co.*, 39 L. J., C. P. 165; L. R., 5 C. P. 135.)

Attendance of
counsel.

It is said that there may be peculiar cases in which the arbitrator would be justified in excluding the parties

Excluding the
parties and

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their solicitors.

(provided he exclude both) and their solicitors, during the examination of witnesses (*Hewlett v. Laycock*, 2 C. & P. 574; *Matson v. Trower*, Ry. & M. 18; *sed quære*, 2 Lush's Practice, 1046); but such cases are exceedingly rare, and the tendency of modern decisions is to establish, that in conducting a reference the arbitrator should allow all the parties the amplest opportunities of elucidating and establishing their claims, and place no unreasonable or factious restrictions upon either party so as to prejudice his interests. Thus, we must regard *Re Haigh's Estate* (3 De G., F. & J. 157; 31 L. J., Ch. 420), in which an award was set aside because the arbitrator had excluded from some of the meetings, in a reference in which a partnership accounts were concerned, the son of one of the parties who was conversant with the accounts, and also a shorthand writer, both of whom the party wished to have present, as indicating the limits within which an arbitrator may exercise his discretion, rather than *Tillam v. Copp* (3 C. B. 211), in which an arbitrator in a farming case was held justified in excluding a stranger skilled in agriculture, brought to assist the defendant's solicitor in conducting the case. "Except in the few cases where exceptions are unavoidable," says Lord Langdale, "both sides must be heard, and each in the presence of the other." (*Harvey v. Shelton*, 7 Beav. 462; 13 L. J., Ch. 466.) And Turner, L. J., thus clearly defines the restrictions upon the arbitrator's power of exclusion: "Before he excludes anyone from attending on behalf of any of the parties interested, he is bound to ascertain that there is good reason for the exclusion, and to take the best care he can that the party who is affected by the exclusion is not prejudiced by it." (*Re Haigh's Estate*, *supra*.)

Mode of proceeding same as at *nisi prius*.

The mode of proceeding at a reference is, as near as may be, the same as in an action at *nisi prius*. Thus, the party to begin makes a short statement of his case

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(this may, at the option of the arbitrator, be dispensed with), and then calls his witnesses in support of it, who of course may be cross-examined; the other party then makes a short statement of his case, and produces his evidence in support of it; he then replies on the whole case, and the party beginning has a general reply. If any question arise as to who is entitled to begin, the arbitrator will decide it. The mode of conducting a reference being, however, in the discretion of the arbitrator, will sometimes vary from the above.

It has been held that an arbitrator, though bound to act according to the general rules of law, is not bound by the strict rules of practice, but is to do justice between the parties according to the particular circumstances of the case. (*Re Badger*, 2 B. & A. 691; *Know v. Symmonds*, 1 Ves. jun. 369.)

Arbitrator not bound by rules of practice.

If the submission prescribe any act which is a condition precedent to the reference, it must be performed or the award will be bad. Such is the declaration required under the L. C. C. Act, 1845, and other statutes. (*Ante*, p. 125.) If the parties agree to waive any objection on account of an omission of the arbitrator to make the declaration they are estopped from afterwards insisting upon it. (*Palmer v. Metropolitan Rail. Co.*, 31 L. J., Q. B. 259.) The locality where the declaration is made is not essential to the validity of the declaration, and it is no objection that it is not made before a justice of the county where the matter in dispute arose. (*Davies v. South Stafford Rail. Co.*, 21 L. J., M. C. 52.)

Performance of conditions precedent.

Unless a view of the premises is obligatory by the terms of the submission (*Spence v. Eastern Counties Rail. Co.*, 7 Dow. 697), it is in the discretion of an arbitrator, to whom an action for work has been referred, to inspect the premises on which the work was done, and his refusal to inspect is no ground for setting aside his

View of the premises.

CHAP. XI. award. (*Mundy v. Black*, 9 C. B., N. S. 557; 30 L. J., C. P. 193.)

SECT. 2.—*Witnesses.*

The Arbitration Act, 1889, makes provision for the compulsory attendance of witnesses and production of documents, in the case of references by consent out of court.

Examination
of the parties
and produc-
tion of their
documents.

The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require. (Arbitration Act, 1889, sched. 1, cl. (f).)

Enforced by
committal.

As a submission under the Act has the same effect as if it had been made an order of court, any disobedience of the parties to an order of the arbitrator may be punished by committal for contempt.

Discovery.

The jurisdiction to order discovery of documents is in the hands of the arbitrator (*infra*, p. 138), and application should not be made to the court. (*Peurice v. Williams*, 23 Ch. D. 353; 52 L. J., Ch. 593.)

Enforcing
attendance of
witnesses.

Any party to a submission may sue out a writ of *subpoena ad testificandum*, or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action. (Arbitration Act, 1889, s. 8.)

The writs issue as of course, and may be obtained at the writ department of the Central Office without an order.

The procedure as to the issue of writs of subpoena is governed by R. S. C. Order XXXVII. rr. 26—34.

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A person subpoenaed to attend, and refusing, cannot be committed for contempt until a reasonable sum has been tendered to cover the cost of coming and his expenses.

When a witness produces a mass of documents, a party is not entitled to put in the whole *en bloc*, or to go through them *seriatim*; he should take an adjournment to ascertain which are material. (*Re The Maplin Sands*, 71 L. T. 594.)

Before the Act the mode of enforcing the attendance of witnesses and the production of documents was by a judge's order. (*Aute*, p. 38.)

The court has no power to order a commission to issue to examine witnesses abroad in aid of an arbitration. (*Re Shaw and Ronaldson* [1892] 1 Q. B. 91; 61 L. J., Q. B. 141; *Re Dreyfus and Paul*, 37 Sol. J. 357.)

Commission to examine witnesses.

When a matter is referred by a county court judge, he has jurisdiction to compel the attendance of witnesses before the arbitrator (*Re Ackery*, 3 Ch. D. 125; 45 L. J., Bkey. 133), and may commit to prison a party who refuses to produce documents according to the terms of the order of reference. (*Richards v. Cullerne*, 7 Q. B. D. 623.)

Jurisdiction of county court judge over witnesses.

The court or a judge may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before an official referee, or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom. (Arbitration Act, 1889, s. 18, sub-s. 1.) Formerly, there was no power to compel the attendance before an arbitrator of a witness in Ireland or Scotland.

Compelling attendance of witness in United Kingdom.

The court or a judge may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire. (Arbitration Act, 1889, s. 18, sub-s. 2.)

And *habeas corpus* to bring up prisoner.

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The application for an order under the section is made by summons in chambers.

Evidence and procedure as at a trial before a judge.

It is provided by R. S. C. Order XXXVI. r. 49, that, "subject to any order to be made by the court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by *subpoena*, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge." And, by rule 50, the referee shall have the same authority with respect to discovery and production of documents as a judge of the High Court.

By rule 55c, which came into force after, and was intended to supplement, the Arbitration Act, 1889, these rules, and in fact rules 48 to 55 inclusive, were made to apply where any matter is referred to an arbitrator.

This application of the two rules (49 and 50), was probably intended to replace section 7 of the C. L. P. Act, 1854, which is not otherwise re-enacted.

Witnesses may be excluded until examined.

The arbitrator may, if he think fit, exclude persons who are to be examined before him whilst another witness is undergoing examination or the like. (*Hewlett v. Haycock*, 2 C. & P. 574.)

Examination of witnesses on oath.

The following provisions as to the examination of the witnesses on oath, are made by the Arbitration Act, 1889, viz.: "The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation." (Sched. 1, cl. (g).)

"The arbitrators or umpire acting under a submission shall, unless the submission express a contrary intention, have power to administer oaths or to take the affirmation of the parties and witnesses appearing." (Sect. 7.)

If the instrument of reference requires the evidence to be on oath, the arbitrator may not dispense with the formality without the consent, express or implied, of the parties (*Ridoat v. Pye*, 1 B. & P. 91; *Allen v. Francis*,

9 Jur. 691; *Wakefield v. Llanelly Rail. Co.*, 34 Beav. 245); but the court will not set aside an award on the ground that the witnesses were not sworn if the objection is not taken before the arbitrator. (*Biggs v. Mansell*, 16 C. B. 562.) If the instrument of reference leave the swearing of witnesses in the discretion of the arbitrator, he may, at his option, dispense with the oath, even though one of the parties request otherwise. (*Smith v. Goff*, 14 M. & W. 264.)

The chief statutory enactments for reference provide that the examination of the parties and their witnesses may be on oath. It should be so, unless both parties dispense with it. (*Wakefield v. Llanelly Rail. Co.*, 34 Beav. 245.)

Statutory references.

Where the submission required the witnesses to be examined on oath, and the arbitrator received some affidavits, the court set aside the award, holding that the deponents should have been examined *vivâ voce*. (*Banks v. Banks*, 1 Gale. 46.)

Affidavits.

Copies of entries in bankers' books are evidence in proceedings before an arbitrator, and may be verified by affidavit. (42 & 43 Vict. c. 11, s. 5.)

Of bankers' books.

No particular form of words is necessary to make the oath binding. The following may be useful as a precedent:—

“You shall true answers make to all such questions as shall be asked of you touching the matters in question between the parties to this reference: So help you God.”

Should a witness object to be sworn, he may make his solemn affirmation; and the following form may be adopted in such a case:—

“I, A. B., do solemnly, sincerely, and truly declare and affirm that I will true answers make to all such questions as shall be asked me touching the matters in question between the parties to this reference.”

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Witnesses
privileged
from arrest.

Witnesses compulsorily attending a reference have the same privilege in being protected from arrest as witnesses attending courts of justice. (*Moore v. Booth*, 3 Ves. 350; *Spence v. Stuart*, 3 East, 89; *Randall v. Gurney*, 3 B. & A. 252; 2 Taylor on Evidence, 1153.) And though a witness attend a reference voluntarily, he will still be protected, inasmuch as he might have been compelled to attend. (*Webb v. Taylor*, 13 L. J., Q. B. 24; 1 D. & L. 676, *per* Patterson, J.) The arbitrator has no power to discharge a witness from custody.

Punishable for
perjury.

Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly. (Arbitration Act, 1889, s. 22.)

The manufacture of false evidence, intended to be used, and to deceive arbitrators, such as tampering with samples taken from a bulk, is a common law misdemeanor, although the evidence is never used. (*Reg. v. Treones* [1891] 1 Q. B. 360; 60 L. J., M. C. 62.)



SECT. 3.—Evidence.

Power of
arbitrator to
decide ques-
tions of
evidence.

Arbitrators are bound by the same rules of evidence as courts of law. (*Att.-Gen. v. Davison*, M'C. & Y. 160.) But if an arbitrator make a mistake in the law of evidence the court will not, after award, review his decision. (*Campbell v. Tremlow*, 1 Price, 81; *Hagger v. Baker*, 14 M. & W. 9.) He is the judge of the *admissibility* of evidence so far as the competency of the witnesses is concerned, and if he receive the evidence of an incompetent, or reject that of a competent witness, the court will not generally set aside the award. (*Lloyd v. Archbottle*, 2 Taunt. 324; *Perriman v. Steggall*, 9 Bing. 679; *Armstrong v. Marshall*, 4 Dow. 593; *Hagger v. Baker*,

14 M. & W. 9; *Eastern Counties Rail. Co. v. Robertson*, 6 M. & G. 38; 1 D. & L. 498; *Scott v. Van Sandau*, 6 Q. B. 237; *Symes v. Goodfellow*, 2 Scott, 769; 2 Bing. N. C. 532.)

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But we have seen (*ante*, p. 97) that before the award the court may, upon application, revoke the arbitrator's authority if he admit improper evidence or refuse to admit evidence which is legally admissible. (*Hart v. Duke*, 32 L. J., Q. B. 55.) This is the proper way to take the opinion of the court on a question as to the admission or rejection of evidence.

How opinion
of court taken
on evidence.

We must distinguish between a rejection of evidence as being inadmissible under the rules of evidence and a rejection on the ground that it is not material to the issues. (See *Re Marsh*, 16 L. J., Q. B. 330.) Exercising any discretion as to the amount of evidence, or rejecting evidence on any matter which the arbitrator may think foreign to the subject of the reference, is a step that should be taken with great caution (*Johnston v. Cheape*, 5 Dow, H. L. 247), for if the arbitrator refuse evidence of matters within the scope of the reference, under the mistaken impression that they are not within it (*Samuel v. Cooper*, 2 A. & E. 752; *Brophy v. Holmes*, 2 Molloy, 1), or refuse to examine a material witness because he thinks there is sufficient evidence without (*Phipps v. Ingram*, 3 Dow. 669), this will invalidate the award. But the evidence or witness must have been actually tendered. (*Craven v. Craven*, 7 Taunt. 644.)

Materiality of
evidence not
determinable
by arbitrator.

An affidavit to set aside an award on the ground that the arbitrator has refused to examine a material witness should state what reason, if any, he gave for refusing to hear the witness. (*Bradley v. Ibbotson*, 2 L. M. & P. 583.)

The court refused to set aside an award upon an affidavit that an arbitrator said that he would look at affidavits, but that they would have no weight with him.

CHAP. XI. (*Imperial Royal Chartered Azienda v. Funder*, 21 W. R. 67, 116.)

Unstamped documents.

An instrument which is chargeable with stamp duty cannot, except in criminal proceedings, be admitted in evidence without being properly stamped. If produced to an arbitrator or referee, and the instrument is one which may legally be stamped after execution, it may, on payment to the arbitrator or referee of the amount of the unpaid duty and the penalty payable on stamping the same, and a further sum of 1*l.*, be received in evidence. (54 & 55 Vict. c. 39, s. 14.) It is now, therefore, the duty of an arbitrator or referee to see that every instrument put in evidence is properly stamped, and if insufficiently stamped to receive payment of the unpaid duty and penalty and pay them over to the Inland Revenue.

Arbitrator must call parties before him and take evidence.

Primâ facie, the duty of an arbitrator is to summon the parties before him, take the evidence which they wish to adduce, and make his award upon and according to the evidence. Though the matters referred may almost tell their own tale, as in the case of dilapidations, the arbitrator must not make his award without calling the parties before him, as there may be other facts which the parties would like to adduce as to liability. (*Anon.*, 2 Chitt. 44; *Re Hawley and North Stafford Rail. Co.*, 2 De G. & Sm. 33.)

Unless the submission negative the duty,

If it is in terms referred to a person to decide, from his special knowledge of the subject-matter in dispute, he may refuse to receive evidence. (*Johnston v. Cheape*, 5 Dow, H. L. 247.)

or the reference is to an expert.

When a matter is referred to an expert as such, and he is competent to decide from personal observation, he need not take evidence unless requested to do so. (*Bottomley v. Ambler*, 38 L. T. 545; 26 W. R. 566; *Wright v. Howson*, 4 Times L. R. 386.) "I do not think, when a matter is referred to surveyors or other persons of skill

to fix the value of property to be bought or let, that the meaning is that they are necessarily to examine witnesses; they are intrusted, from their experience and observation, to form a judgment which the parties referring to them agree shall be considered satisfactory." (*Eads v. Williams*, 4 De G., M. & G. 687, *per* Lord Cranworth.) There might be a reference between an incoming and outgoing tenant where an inspection of the farm would afford every information necessary. In such a case it might be, if the usage were so, that the referees need not give notice of their meetings to the parties or have their attendance, but might make their award on a view of the farm. (*Oswald v. Grey*, 24 L. J., Q. B. 69, *per* Erle, J.) But in any case, unless the parties have expressly agreed that the arbitrator need not take evidence, either party may claim, at any time before the award is made, to be heard and to adduce evidence. (*Re Maumder*, 49 L. T. 535.)

When evidence is received, the arbitrator must observe the principles of universal justice recognized in the conduct of judicial proceedings, which require that a person who may be prejudiced by evidence ought to be present to hear it taken, to suggest cross-examination, or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it. (*Drew v. Drew*, 2 Macq. 1; *Re Brook*, 33 L. J., C. P. 246; 16 C. B., N. S. 403; *Thorburn v. Barnes*, 36 L. J., C. P. 184; L. R., 2 C. P. 384.) An award will not stand—

Arbitrator must hear both sides and take evidence in the presence of both parties.

1. Where the arbitrator hears one party and refuses to hear the other. (*Sharpe v. Bickerdyke*, 3 Dow, H. L. 102; *Oswald v. Grey*, 24 L. J., Q. B. 69; *Phipps v. Ingram*, 3 Dow. 669.)

2. Where the arbitrator holds private communications with one of the parties on the subject-matter of the reference. (*Fetherstone v. Cooper*, 9 Ves. 69; *Harvey v. Shelton*, 13 L. J., Ch. 466; 7 Beav. 462; *Re Tidswell*, 33 Beav. 213.)

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3. Where the arbitrator, unless justifiably proceeding *ex parte*, examines one of the parties (*Re Hick*, 8 Taunt. 694), or the witnesses on one side (*Pepper v. Gorham*, 4 Moore, 148; *Walker v. Frobisher*, 6 Ves. 70; *Re Brook*, *supra*), in the absence of the other party; or receives information from the one party in the absence of the other. (*Re Gregson and Armstrong*, 70 L. T. 106.)

4. Where the arbitrator examines witnesses in the absence of both parties. (*Re Plews and Middleton*, 14 L. J., Q. B. 139; 6 Q. B. 845; *Kingwell v. Elliott*, 7 Dow. 423.)

The award will be set aside, notwithstanding the arbitrator may swear that the evidence thus received had no effect upon his award (*Walker v. Frobisher*, 6 Ves. 70; *Dobson v. Groves*, 6 Q. B. 637; 14 L. J., Q. B. 17; *Fetherstone v. Cooper*, 9 Ves. 67), unless the objection be waived.

The same rules apply, and the same course of proceedings ought to take place, in a mercantile as in any other reference. (*Harvey v. Shelton*, *supra*.)

Where a letter book, containing copies of letters which had been adduced in evidence before an arbitrator, and marked by him as read, was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced, and he referred to a copy of a letter which had not been so marked, the court directed that the case should be referred back to the arbitrator in order that the party against whom the letter complained of had been used might have an opportunity of explaining its contents, but refused to set aside the award. (*Davenport v. Vickery*, 9 W. R. 701.)

Private communications.

If one party make any private written communication to the arbitrator touching the subject-matter of reference, the arbitrator should inform the other party, or hand the communication over to him. (*Harvey v. Shelton*, 7 Beav. 462; 13 L. J., Ch. 466.)

In *Anderson v. Wallace* (3 C. & F. 26) it was decided that an award was not invalidated by the arbitrator, in the absence of one of the parties, calling on the other party and asking him whether he admitted or disputed certain items in an account, and merely taking his answer to that question. But had he received any explanations of items in the absence of the other party it would have been different. (*Re Haigh's Estate*, 3 De G., F. & J. 157.)

The only safe course for an arbitrator, unless proceeding *ex parte*, is to insist that all information in relation to the matter in reference, communicated by one party, or his witnesses or agents, shall be in the presence of the other. (*Drew v. Drew*, 2 Macq. 1.)

The parties may consent to the arbitrator informing his mind by taking evidence in the absence of the parties (*Matson v. Trower*, Ry. & M. 17; *Re Plews and Middleton*, 14 L. J., Q. B. 139, *per Coleridge, J.*); but such a course could not be justified by any alleged usage. No usage would be legal, for arbitrators to make their award upon the examination of the witnesses of the one party in the absence of the other, and without notice to the latter. (*Re Brook*, 16 C. B., N. S. 403; 33 L. J., C. P. 246; *Oswald v. Grey*, 24 L. J., Q. B. 69.)

Any objection to irregular or improper conduct on the part of the arbitrator may be waived by the parties, either expressly or by their conduct (*Re Salkeld and Slater*, 12 A. & E. 767; *Bignall v. Gale*, 10 L. J., C. P. 169; 2 M. & G. 830), providing the party waiving have full knowledge of the defect. (*Earl of Darnley v. London, Chatham and Dover Rail. Co.*, L. R., 2 H. L. 43; 36 L. J., Ch. 404.) When it comes to the knowledge of a party, that the arbitrator has examined witnesses in his absence, he should at once either abandon the reference or apply in chambers to revoke the submission, for if he continue to attend the subsequent proceedings this will

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Inquire whether party disputes items.

No information should be received behind the back of a party.

Irregular proceedings sanctioned by agreement.

Or waived by the parties.

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be a waiver. (*Drew v. Drew*, 2 Macq. 1; but see *Re Haigh's Estate*, 31 L. J., Ch. 420.) Where, pending a reference, the umpire held a communication with the agents of one of the parties, this fact being known to all the parties at the time, and not objected to by any of them, and the reference having proceeded and the award being subsequently made, it was held that neither of the parties could object to the award on the ground of such communication, having acquiesced in it. (*Mills v. Bowyer's Society*, 3 K. & J. 66; *Hamilton v. Bankin*, 19 L. J., Ch. 307.)

Receiving
evidence of
matters not
within the
submission.

An arbitrator may receive evidence upon matters denied by one of the parties to be in difference, and, provided his award does not exceed his authority, it will not be thereby invalidated (*Arbuckle v. Price*, 4 Dow. 174); and he may inquire into collateral matters necessary to decide the matters submitted. (*Eastern Counties Rail. Co. v. Robertson*, 1 D. & L. 498.)

If a party to a reference objects that the arbitrator is entering on the consideration of a matter not referred to him, and protests against it, and the arbitrator nevertheless goes into the question and receives evidence on it, and the party, still under protest, continues to attend before the arbitrator and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrator has exceeded his authority by awarding on the matter. (*Davies v. Price*, 34 L. J., Q. B. 8; *ante*, p. 107.)

Giving time
for the pro-
duction of
evidence.

The arbitrator before closing the hearing should receive all the evidence on both sides. (*Bedington v. Southall*, 4 Price, 232; *Doddington v. Hudson*, 1 Bing. 384; *Phipps v. Ingram*, 3 Dow. 669.) An arbitrator has no authority to say he has fully heard the case on both sides as against the desire of one of the parties to adduce further evidence. (*Re Maunder*, 49 L. T. 535.) When the parties require further time for the production of evidence it is generally

in the power of the arbitrator to decide whether the party so applying has made out such a case as ought to induce him to put off the further hearing or postpone his award (*Ringer v. Joyce*, 1 Marsh. 404; *Giuder v. Curtis*, 14 C. B., N. S. 723); although the courts do not regard this as a fixed rule applicable to every case (*Spettigue v. Carpenter*, 3 P. W. 361); and the arbitrator ought generally to comply with the request, if it is made on reasonable grounds. (*Solomon v. Solomon*, 28 L. J., Ex. 129.) It is in the discretion of the arbitrator whether he will give time for one of the parties to bring a material witness from abroad. (*Giuder v. Curtis*, *supra*.) And when an application was made to arbitrators to afford time to obtain and examine a witness who was absent, and they honestly (though erroneously) exercised their discretion as to the materiality of his evidence, and refused time, the court would not set aside the award. (*Larchin v. Ellis*, 11 W. R. 281.)

Notes of the evidence should be taken by the arbitrator, even though the case is short. (*Croom v. Gore*, 25 L. J., Ex. 267; 1 H. & N. 14.)

It is said that an arbitrator may consult men of science in every department where it becomes necessary (*Caledonian Rail. Co. v. Lockhart*, 3 Macq. 808, *per* Lord Wensleydale); and though he cannot agree beforehand to be bound by whatever opinion another man may give, for that would be a delegation of his authority, he may submit a question to another person of skill or science and adopt the opinion given thereon as his own (*Emery v. Wase*, 5 Ves. 846; 8 Ves. 504; *ante*, p. 115), but only if he forms his own judgment upon it and believes it to be correct. (*Eads v. Williams*, 24 L. J., Ch. 531; 4 De G. M. & G. 674.) Under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it is no objection to their award that they

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Notes should be taken.

Arbitrator's power to consult persons of skill and science.

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have availed themselves of the assistance of such a person in deciding on the partnership accounts; the arbitrators by adopting in terms the opinions of such person do not constitute him an umpire, but make his opinions their own, and their award cannot be impeached on that account. (*Anderson v. Wallace*, 3 C. & F. 26.) And so, where matters in difference being referred to two arbitrators, the parties consented that they might in case of difficulty consult a third person, who was named, and the arbitrators did so on one out of the whole number of questions arising in the investigation, and they adopted the opinion which he gave them upon it, without, as far as appeared, exercising any independent opinion, and made their award on the whole of the matters referred, it was held that the award was not thereby invalidated. (*Whitmore v. Smith*, 31 L. J., Ex. 107; 8 Jur., N. S. 514.) When, however, it is desired to obtain the assistance of a valuer, or scientific or skilled person, on a matter of fact, the regular and proper way to do so is to examine him as a witness. (*Anderson v. Wallace*, *supra*, per Lord Brougham; *Hopcraft v. Hickman*, 2 S. & S. 130.)

An action on a builder's account being referred to a master, it was held that he was entitled to appoint a surveyor to report as to value, but that he must receive the report in the same way as other evidence, and could not refuse to hear additional evidence tendered by the parties. (*Gray v. Wilson*, 35 L. J., C. P. 123; L. R., 1 C. P. 50.)

Legal assist-
ance.

A lay arbitrator may consult counsel on the admissibility of evidence, or as to the framing of his award (*Re Hare*, 6 Bing. N. C. 158; *Dobson v. Groves*, 6 Q. B. 637); or may take an opinion upon a point of law (*Rolland v. Cassidy*, 57 L. J., P. C. 99; 13 App. Cas. 770); or he may employ a professional man to draw up his award so as to make it good in point of form (*Fetherstone*

v. *Cooper*, 9 Ves. 67; *Baker v. Cotterill*, 18 L. J., Q. B. 345; *Galloway v. Keyworth*, 23 L. J., C. P. 218), but it should not be the solicitor of either of the parties. (*Re Underwood and Bedford and Cambridge Rail. Co.*, 11 C. B., N. S. 442; 31 L. J., C. P. 10.) A recital in an award that it had been drawn by a person who under the terms of the submission attended the arbitrator as his solicitor was held to show no improper delegation of authority. (*Baker v. Cotterill*, *supra*.)

As a general rule a lay arbitrator will be entitled to have a legal adviser to sit with him in the reference, for where the parties appoint a lay arbitrator, if the reference is to be brought to a safe conclusion, it is almost of necessity that he should have professional assistance in the conduct of it. (*Threlfall v. Fanshawe*, 19 L. J., Q. B. 334, *per* Coleridge, J.) But where one of the parties had expressly objected to a legal arbitrator, and a lay arbitrator was appointed, the arbitrator so appointed was held not to be entitled to have a solicitor to sit with him. (*Proctor v. Williamson*, 29 L. J., C. P. 157; 8 C. B., N. S. 386.)

Lay arbitrator entitled to a legal adviser.

When an arbitrator, in taking accounts, is authorized under the reference to appoint an accountant, "not objected to by any of the parties," he may not appoint one without communicating with the parties. (*Re Tidswell*, 33 Beav. 213.)

Employing accountant.

An arbitrator having to settle costs may obtain professional help. (*Rowcliffe v. Devon and Somerset Rail. Co.*, 21 W. R. 433.)

An arbitrator has power, subject to his discretion, to proceed *ex parte* upon good cause, as, for instance, where one of the parties keeps back his evidence to delay the reference (*Hetley v. Hetley*, Kyd on Awards, 100), or will not attend, the appointment being for a reasonable time, and the arbitrator is convinced that the object of non-attendance is to defeat the reference. (*Wood v.*

Power to proceed *ex parte*.

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Leake, 12 Ves. 412; *Waller v. King*, 9 Mod. 63.) Where one party has ineffectually attempted to revoke the submission, and refuses afterwards to attend the reference, the arbitrator may proceed *ex parte*. (*Harcourt v. Ramsbottom*, 1 J. & W. 512.) And in *Hobbs v. Ferrars* (8 Dow. 779), it was held that the arbitrator might proceed *ex parte*, after notice, where one party became insolvent. But an arbitrator should not proceed *ex parte* if there is a reasonable excuse for a party's non-attendance. (*Gladwin v. Chilcote*, 9 Dow. 550; *Proctor v. Williamson*, 29 L. J., C. P., 157; 8 C. B., N. S. 386.)

Giving notice
of *ex parte*
proceedings.

When it is intended to proceed *ex parte* the arbitrator should generally give notice of such intention to the absenting party, either verbally or in writing. (*Gladwin v. Chilcote*, *supra*.) But where an arbitrator appoints a reasonable time for the hearing, a party who desires delay should appeal to the arbitrator, stating his reasons, and if they are well founded the delay will be granted. (*Re Hewitt and Portsmouth Waterworks*, 10 W. R. 780.) If he simply refuse to attend, the arbitrator may proceed *ex parte*. (*Ib.*) And where a party, having received notice of a meeting to proceed in the reference, did not attend, the arbitrator was held justified in proceeding *ex parte* at the next meeting without a peremptory appointment. (*Angus v. Smythies*, 2 F. & F. 381.) Even where an arbitrator had made an appointment for a meeting on the premises, for the purpose of a view "and to go into the reference," and one of the parties, although under the mistaken notion that there would be notice of another meeting before an award was made, went away without obtaining any other appointment, or intimating his desire to offer evidence, or to make any defence, the arbitrator was held entitled to proceed *ex parte*, and without further notice to make an award. (*Tryer v. Shaw*, 27 L. J., Ex. 320.) So where an arbitrator having, in the course of the reference, appointed a meeting for a

certain day, was informed by the defendant that he did not intend to be present, one of his reasons being that on account of the non-admissibility of certain depositions, which the arbitrator had not rejected as evidence, no award he could make would be valid, and another reason being that the notice (seventeen days) was too short; the arbitrator was held to have acted rightly in proceeding *ex parte*, though he had not warned the defendant that if he absented himself the arbitration would proceed. (*Scott v. Van Sandau*, 6 Q. B. 237.) Objections on the ground of want of notice will be waived by attendance at subsequent meetings. (*Bignall v. Gale*, 9 Dow. 631; 2 M. & G. 830.)

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The evidence being closed, the arbitrator should inform both parties that he considers the case closed, and that he shall proceed to make his award. (*Petersou v. Ayre*, 23 L. J., C. P. 129.) Where arbitrators who had proceeded in a reference informed the defendant that they would suspend their proceedings till the books of account had been referred to, it was held that afterwards making an award in his absence, without examining the books of account, was ground for setting it aside. (*Pepper v. Gorham*, 4 Moore, 148.) So where arbitrators promised to hear certain witnesses and made their award without doing so (*Earl v. Stocker*, 2 Vern. 251); or refused to hear evidence tendered while the case was still open. (*Re Maunder*, 49 L. T. 535.)

Case closed,
parties should
be informed.

When the case has been formally closed the arbitrator may, if he think fit, allow the production of further evidence (*Bignall v. Gale*, *supra*), or he may refuse to re-open the case. (*Henning v. Parker*, 14 W. R. 328.)

Re-opening
the case.

CHAPTER XII.

THE AWARD.

SECT. 1.—*Form and General Requisites of an Award.*

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Time within
which award
must be made.

THE evidence on both sides being fully heard and the case closed, the arbitrator proceeds to make his award. It must be made within the time limited for that purpose. If he has until a certain day, "until" will be construed as inclusive (*Knox v. Simmonds*, 3 Bro. C. C. 358; *Kerr v. Jeston*, 1 Dow., N. S. 538); and if he has a certain length of time "after" matters are referred, the day of reference is excluded. (*Re Higham and Jessop*, 9 Dow. 203.) A limitation in "months" simply, will be construed as lunar, not as calendar, months. (*Re Swinford*, 6 M. & S. 226; and see *Simpson v. Margetson*, 17 L. J., Q. B. 81; 11 Q. B. 23.) A reference under a statute which contains a limitation in "months" means calendar months, unless words be added showing lunar months to be intended. (52 & 53 Vict. c. 63, s. 3.) The arbitrator has no power to shorten the time given by the submission. (*Re Morphett*, 2 D. & L. 967.)

When arbitra-
tor bound
to award.

The arbitrator is not bound to make an award, notwithstanding he has held several meetings. (*Lewin v. Holbrook*, 11 M. & W. 110; *Crawshay v. Collins*, 1 Swanst. 40; 3 *ib.* 90.) But he may contract to give his award upon the matter, and he is then as much bound to do so, as the parties are to abide by his decision. (*Pappa v. Rose*, 41 L. J., C. P. 187; L. R., 7 C. P. 525, *per Kelly*, C.B.)

It is not necessary to the validity of an award that it should be in any precise form of words or make use of any technical expressions (*Eardley v. Steer*, 4 Dow. 423); it is enough if it clearly show that the arbitrator has finally decided on the matters submitted to him. (*Lock v. Vulliamy*, 5 B. & Ad. 600, *per* Parke, J.; *Archer v. Owen*, 9 Dow. 341; *Bradlee v. Christ's Hospital*, 2 Dow., N. S. 164; *Law v. Blackburn*, 23 L. J., C. P., 28; *Whithead v. Tattersall*, 1 A. & E. 491.) Even an award in the form of an opinion has been held sufficient (*Matson v. Trower*, R. & M. 17); so has an award of a sum in favour of one party and a request to the other party to pay. (*Smith v. Hartley*, 10 C. B. 800.) But a letter from the arbitrator to the parties, in which he said, "To meet the circumstances of the case in a liberal manner I propose that Mr. V. shall pay Mr. L. 10l.," was held not to be an award, but a mere recommendation. (*Lock v. Vulliamy*, 5 B. & Ad. 600; and see *Fergusson v. Norman*, 4 Bing. N. C. 52.) An arbitrator ill fulfils his task who makes his award in a loose and ambiguous manner.

Recitals, though usual, are not necessary in an award. Thus, the omission to recite an enlargement of time (*George v. Lousley*, 8 East, 13), or a view of the premises required by the submission (*Spence v. Eastern Counties Rail. Co.*, 7 Dow. 697), or the performance of any other condition precedent (*Davies v. Pratt*, 17 C. B. 183; 25 L. J., C. P. 71), is no objection to an award.

When made, the recitals should show (1) the authority of the arbitrator, (2) the subject-matter with which he has to deal, (3) the powers that have been exercised, (4) the powers to be exercised by the award, and (5) the performance of conditions prescribed by the submission—in fact, the draftsman, in his recitals, will be governed by the particular circumstances of the case and those

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Form of the award.

Recitals.

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considerations which are entertained by a conveyancer in drawing an ordinary instrument made in pursuance of a power.

Effect of recitals.

Recitals are not without importance, for they will often explain what would otherwise be an ambiguous or doubtful award. (*Elliott v. Chevall*, 1 Lutw. 541; *Watmough v. Holgate*, 2 Vent. 221.) But an untrue recital, as, that the award is made by three arbitrators, when in fact two only execute it (*White v. Sharp*, 12 M. & W. 712), or, contrary to the fact, that the time has been enlarged after instead of before the last day for enlargement (*Re Lloyd and Spittle*, 18 L. J., Q. B. 151; 6 D. & L. 531), or, that the umpire was chosen by the parties, when he was in fact appointed by the arbitrators (*Adams v. Adams*, 2 Mod. 169), or that an action is referred, without mentioning other matters in difference (*Paull v. Paull*, 2 Dow. 340), or the like (*Watkins v. Phillpotts*, M'Cl. & Y. 397; *Thames Iron Works Co. v. The Queen*, 10 B. & S. 33; *Trew v. Burton*, 1 C. & M. 533; *Harlow v. Read*, 1 C. B. 733; 3 D. & L. 203), will not vitiate an award; nor, on the other hand, will a bad award be helped by a misrecital. (*Price v. Popkin*, 10 A. & E. 139.)

Plans and writings incorporated by reference.

A plan may be annexed to an award and incorporated with it, and the words of explanation on the map may be taken as part of the award. (*Johnson v. Latham*, 20 L. J., Q. B. 236.) So an indenture or other writing may be incorporated by reference without setting it out. (*Anon.*, 1 Vent. 87.)

Formalities requisite.

The award must be made and executed with all the material formalities (*Gatliffe v. Dunn*, Barnes, 55) required by the submission, and if it is provided that the award shall be "under hand and seal" it is no award unless so made (*Everard v. Paterson*, 6 Taunt. 625; *Henderson v. Williamson*, 1 Stra. 116); if, however, nothing is said in the submission as to the form of

the award, the arbitrator may adopt such formalities as he chooses, or may make a verbal award. (*Hanson v. Liversedge*, 2 Vent. 242; *Rawling v. Wood*, Barnes, 54; *Oates v. Bromell*, 6 Mod. 160, 176; 1 Salk. 75; *Roberts v. Watkins*, 32 L. J., C. P. 291.) This now, however, applies only to awards in pursuance of submissions which are not contained in some document subject to the Arbitration Act, 1889. For schedule 1 to that Act, cl. (c), provides that "the arbitrators shall make their award in writing." We have indicated (*ante*, pp. 8, 87) that this applies to a single arbitrator. Clause (c) in the same schedule says "the umpire shall make his award," but does not say that it shall necessarily be in writing.

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When required to be in writing.

The chief statutory enactments for arbitration provide for the awards being made in writing. An award under the L. C. C. Act, 1845, or the Railways Clauses Act, 1845, must not only be in writing, but must have the declaration made and subscribed by the arbitrator before entering on the reference annexed to it when made (8 & 9 Vict. c. 18, s. 33; 8 & 9 Vict. c. 20, s. 134); and under the former Act must be delivered to the promoters of the undertaking (s. 35).

The award is usually signed in the presence of an attesting witness.

Attesting witness.

Where there are two or more arbitrators, all (or the majority required by the submission) must execute the award (*United Kingdom &c. Assurance Association v. Houston* [1896] 1 Q. B. 567) at the same time and place and in the presence of each other (*Wade v. Dowling*, 23 L. J., Q. B. 302; 4 E. & B. 44; *Eads v. Williams*, 24 L. J., Ch. 531; 4 De G. M. & G. 674; *ante*, p. 111); though omission to do so would not be fatal, as the court, on application, would send it back to the arbitrators to be re-executed. (*Auning v. Hartley*, 27 L. J., Ex. 145.) Where an award purported on the face of it to be the award of three arbitrators, but it was signed by two only,

Joint arbitrators must execute together.

CHAP. XII.

yet, as by the submission it was to be by the three or any two of them, it was held a good award of the two. (*White v. Sharp*, 12 M. & W. 712.)

If the submission be to perform the award of the arbitrators *and* their umpire, it would seem that an award by the arbitrators alone is bad (*Hetherington v. Robinson*, 4 M. & W. 608; 7 Dow. 192); and where the reference was to the award of two persons named, and of such person as they should nominate before they proceeded to act, or of a majority of them in case they could not unanimously agree, it was held that no award of the two could be good until the third had had a full opportunity of joining in it, and had declared his dissent from it, or withdrawn from the reference. (*Re Templeman and Reed*, 9 Dow. 962.)

“Publishing”
and “deliver-
ing” the
award.

When the submission provides that the award “shall be made and published ready for delivery to the parties” on a day named, it is considered to be published for the purpose of making it valid when executed, though no notice has been given to the parties (*Henfree v. Bromley*, 6 East, 309; *Brooke v. Mitchell*, 6 M. & W. 473); and “ready for delivery” means delivery on request, for it is “ready” as soon as it is made. (*Robison v. Calwood*, 6 Mod. 82; *Freeman v. Bernard*, 1 Ld. Raym. 247; *Veale v. Warner*, 1 Saund. 327 b; *Wilson v. Wilson*, *ib.* 327 c.) But for the purpose of setting aside the award it is only considered to be published when notice that it is made is given to the parties, and time only begins to run from then. (*Brooke v. Mitchell*, *supra.*) If the submission is that the arbitrator shall deliver his award to the parties it is not complete until actual delivery, and where it is to be delivered to *either of the parties* it must be delivered to each or it is not binding. (*Hungate’s Case*, 5 Rep. 103; *Block v. Palgrave*, Cro. Eliz. 797.) A parol award is capable of “delivery,” viz., a declaration of it to the parties, or either of them,

if they desire it. In cases where a parol award is sufficient, so soon as the arbitrators have agreed upon their award, it is, according to an old case, ready to be delivered. (*Oates v. Bromell*, 6 Mod. 160, 176.)

Until the arbitrator has finally made up his mind, his determination upon a matter is not an award. Signing minutes of an award as instructions would not be considered an award. (*Blundell v. Brettargh*, 17 Ves. 232.) In a case in which a verbal award would have been sufficient, it was held that an intimation by the arbitrator to one of the parties, in the absence of the other, of what he intended to award, was not intended as a declaration of his final mind. (*Thompson v. Miller*, 15 W. R. 353.)

The usual practice after the award is made is to give notice to both parties that it is ready for delivery, together with a note of the arbitrator's fees, leaving it open to either party to take up the award. The stamped award is handed to the party who first applies for it and pays the fees. An unstamped copy is generally given to the other party.

Award delivered to party taking it up.

In the case of a reference under the L. C. C. Act, 1845, the award is, under section 35, delivered to the promoters of the undertaking. If the landowner takes up the award, and pays the umpire's fees, he cannot recover them from the company. (*Earl of Shrewsbury v. Wirral Railways Committee* [1895] 2 Ch. 812.)

Formerly, when an arbitrator had executed a paper as and for his award, and it purported on the face of it to be his award, then he was *functus officio*, and could not of his own authority remedy any mistake or blunder that he had made in executing it. (*Mordue v. Palmer*, 40 L. J., Ch. 8; L. R., 6 Ch. 22; *Brook v. Mitchell*, 6 M. & W. 477.) Thus, where an arbitrator had made a mistake in the calculation of figures (*Irvine v. Elnon*, 8 East, 54), or had put the plaintiff's instead of the

An award cannot be altered.

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defendant's name in the direction to pay costs (*Ward v. Dean*, 3 B. & Ad. 234), or had executed an engrossed copy which omitted some words contained in the draft award (*Mordue v. Palmer*, *supra*), he could not correct the mistake, even within the time fixed for making his award, unless by consent of the parties. If he made such an alteration, the alteration was nugatory, as though it were by a stranger, and the award as originally written would stand good, if the original matter were still legible. (*Henfree v. Bromley*, 6 East, 309.)

Except to
correct clerical
error or slip.

Now the arbitrators or umpire, acting under a submission by consent out of court, have power "to correct in an award any clerical mistake or error arising from any accidental slip or omission." (Arbitration Act, 1889, s. 7 (c).)

An alteration made by a stranger in an award, will not affect it, but leaves it in the state it was before such alteration. (*Trew v. Burton*, 1 C. & M. 533.) Where a mistake other than such as above noticed has been made the court or a judge may send the award back to the arbitrator to be amended. (Arbitration Act, 1889, s. 10 (1).)

Stamping an
award.

An award must be properly stamped, for though an omission or defect in this respect is no ground for setting the award aside (*Preston v. Eastwood*, 7 T. R. 95), yet an application to enforce an award will not be granted until the original is properly stamped. (*Hill v. Slocombe*, 9 Dow. 339.) It may be stamped at any time on paying the penalty.

As a rule, when a document on the face of it does not appear to be an award, it need not be stamped as such; therefore, where the defendant had said that if a miners' jury should say that a shaft down which a horse had fallen was his, he would remunerate the plaintiff, it was held that the verdict of the jury given in writing did not require an award stamp. (*Sybray v. White*, 1 M. & W. 435.) If two persons agree to be

bound by the opinion of counsel, the opinion is not liable to an award stamp. (*Ib.*; *Boyd v. Emmerson*, 2 A. & E. 184.) CHAP. XII.

Where there are several parties to an instrument of submission, having a community of interest in the subject-matter referred, if the award be stamped with one stamp it is sufficient. (*Goodson v. Forbes*, 6 Taunt. 171.)

The following are now the stamps to be impressed upon awards, under 54 & 55 Vict. c. 39 :—

				£	s.	d.
Where the amount or value of the matter						
in dispute does not exceed £5				0	0	3
Exceeds £5 and does not exceed £10				0	0	6
„	10	„	„	20	0	1 0
„	20	„	„	30	0	1 6
„	30	„	„	40	0	2 0
„	40	„	„	50	0	2 6
„	50	„	„	100	0	5 0
„	100	„	„	200	0	10 0
„	200	„	„	500	0	15 0
„	500	„	„	750	1	0 0
„	750	„	„	1,000	1	5 0
And where it exceeds £1,000, and in						
any other case not above provided						
for				1	15	0

It will be observed that the stamp is not in respect of the sum awarded, but of the “amount or value of the matter in dispute.”

If the award is not an “amount or value” the duty is one pound fifteen shillings; so, if the award is partly an “amount or value” and partly something else.

An award may be in the form of a special case stated for the opinion of the court. But, to assist arbitrators, the Arbitration Act, 1889, and the rules of court have Special case.

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enabled them to take the opinion of the court by stating a special case, pending the award. It will be convenient to consider together the difference in the two kinds of special cases.

By way of
award^d

Under section 7 of the Arbitration Act, 1889, unless the submission express a contrary intention, the arbitrators or umpire, under a reference by consent out of court, have power "to state an award as to the whole or part thereof, in the form of a special case, for the opinion of the court."

The power thus given to state a special case applies in the case of an arbitrator acting under the L. C. C. Act, 1845, or other statutory reference. (*Anie*, p. 72.)

Exhausts
arbitrator's
powers.

When an arbitrator has made his award in the form of a special case he has exhausted his powers, and the opinion of the court determines the rights of the parties. (*Re Kirkleatham Local Board* [1893] 1 Q. B. 375; 62 L. J., Q. B. 180.)

Appeal from
judgment on.

An appeal will lie to the Court of Appeal from a decision of the divisional court on an award in the form of a special case stated by an arbitrator. (*Bidder v. North Staffordshire Rail. Co.*, 48 L. J., Q. B. 249; 4 Q. B. D. 412.) It is an appeal from a final, not an interlocutory, order (*Shubbrook v. Tuffnell*, 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740), unless the matter will have to go back to the arbitrator whatever way the court decides, in which case it is to be treated as an interlocutory order. (*Collins v. Vestry of Paddington*, 5 Q. B. D. 368; 42 L. T. 573.)

Costs of
appeal on.

Under section 20 of the Arbitration Act, 1889, the Court of Appeal has power to deal with the costs of an appeal on an award in the form of a special case, notwithstanding the reference is under the L. C. C. Act, 1845—section 34 of which is superseded. (*Re Gonty and Manchester, Sheffield, &c. Rail. Co.* [1896] 2 Q. B. 439. The case of *Re Holliday and the Mayor of Wakefield*, 20 Q. B. D. 699, is no longer applicable.)

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Any referee, arbitrator, or umpire may, at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. (Arbitration Act, 1889, s. 19.)

Special case
pending
arbitration.

The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct; and the court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the court may direct. (R. S. C. Order XXXVI. r. 52.)

Submitting
questions to
the court.

This, by rule 55c of the same order, now applies to any matter referred to an arbitrator.

Section 19 provides for a case being stated at any time before the award is made. It contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. (*Re Knight and Tabernacle Permanent Building Society* [1892] 2 Q. B. 613; 62 L. J., Q. B. 33.)

Arbitrator
may state case
voluntarily

If he does not voluntarily state a case, he may be compelled to do so by the court. There is no power to compel the statement of a case by an arbitrator who is appointed under the Building Societies Acts (57 & 58 Vict. c. 47, s. 20), or under the Friendly Societies Act, 1896. (59 & 60 Vict. c. 25, s. 68.)

Compelled to
state.

It is not a condition precedent to the right to order a

Expression of
opinion on

- CHAP. XII. case to be stated, that the arbitrator shall have indicated in what way he will decide the point raised. (*Re Spillers and Baker* [1897] 1 Q. B. 312.)
- the point not a condition to an order. Application for order to state case. The application for an order to state a case is by summons in chambers. There is an appeal from the decision of the judge to the Court of Appeal. (See Judicature Act, 1894, s. 1 (4).)
- Award made pending application. If, pending an application to the court to compel arbitrators to state a case, they proceed and make their award, it would appear that the court might remit the award under section 10 of the Arbitration Act, 1889, to enable the arbitrators to state their award in the form of a special case.
- Question of law. All that the arbitrator can remit to the court is a question of law, and he must find affirmatively the facts upon which the law depends. (*North and South Western Junction Rail. Co. v. Brentford Union*, 60 L. T. 274; 58 L. J., M. C. 95.)
- No appeal. The jurisdiction of the court under this section is consultative only. The opinion expressed by the court is not an order, and there is no appeal from it (*Re Knight and Tabernacle Permanent Building Society* [1892] 2 Q. B. 613), differing in this respect from a special case by way of award. (*Ante*, p. 160.) As it is not an order it does not appear to be affected by the Judicature Act, 1894, s. 1 (b) (v).
- Costs. Unless the order directing a special case to be stated reserves to the court power over costs, the court cannot deal with the costs of a special case. They are *primâ facie* in the discretion of the arbitrator. (*Re Knight and Tabernacle Building Society, supra.*)
- Procedure on case. If the case is stated in an action it should be filed in the Filing Department, Central Office; if in a submission out of court, in the Associates' Department, Central Office. If stated for the opinion of a judge of the Chancery Division it will be assigned to a judge at the time of filing.

Certificate, in what cases.

Where a verdict is taken at *nisi prius*, and the arbitrator has merely to certify the amount of damages for which the verdict is to be entered up, the certificate does not require a stamp. If there be nothing in the terms of the reference which obliges him to certify within any limited time, there is no rule of practice which obliges him to certify before the return of the jury process. (*Salter v. Yates*, 2 M. & W. 67.) The certificate should indicate exactly the manner in which judgment is to be entered, in the same manner as if the action had been tried. If both parties be entitled respectively to verdicts on different issues it should so state, or if an issue is to be taken distributively, and part found for one party, part for another, it should point out the manner in which the verdict is to be entered. No order of *nisi prius* is necessary where the arbitrator is thus empowered to certify. (*Tomes v. Hawkes*, 10 A. & E. 32.)

SECT. 2.—*An Award must not exceed the Submission.*

An award must not go beyond the submission in things, in person, or in time, or exceed the power given by the submission in the particular case. (*Watson on Awards*, 179.) We have seen (*ante*, p. 129) that the evidence of the arbitrator is admissible to show what claims he has dealt with in his award.

If an award extend to matters not within the scope of the submission it will be void, at least as to so much as is in excess of the submission. (*Hill v. Thorn*, 2 Mod. 309; as to what matters are embraced in a submission, see *ante*, p. 73.) A misrecital will not vitiate an award not otherwise exceeding the submission (*McCabe v. Grey*, 13 Ir. L. Rep. 343; *ante*, p. 154), nor will an award

An award in excess of the submission bad *pro tanto*.

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Examples of
excessive
awards.

be bad which extends to matters contemplated though not expressly named in the submission. (*Onyons v. Cheese*, 1 Lut. 530.) But where the award is palpably in excess of the authority, as (in an old case) an award upon a real action in a submission of all personal actions, it is void. (*Marks v. Marriott*, 1 Ld. Raym. 116.) So if a cause only is referred, the arbitrator cannot decide other matters in difference between the parties. (*Atkinson v. Jones*, 1 D. & L. 225.) If the question in dispute is the right of a buyer to reject goods as inferior in quality, the arbitrator cannot award that the buyer take them with an allowance. (*Re Green and Balfour*, 63 L. T. 97, 325; *Hooper v. Balfour*, 62 L. T. 646.) If the submission is as to the boundaries of certain land, and he enter into the question of title and decide it, or the like, the award to that extent will be bad (*Doe d. Ld. Carlisle v. Bailiff of Morpeth*, 3 Taunt. 378); though he may inquire into matters *dehors* the matter referred, if it is necessary for adjudicating upon the matters referred. (*Eastern Counties Rail. Co. v. Robertson*, 6 Scott, N. R. 802.) If he decide upon a right not claimed, or matters abandoned by the parties (*Hooper v. Hooper*, M'Cl. & Y. 509; *Crawford v. London Dock Co.*, 2 Cr. & M. 637; *Bird v. Cooper*, 4 Dow. 148), or expressly excluded from (*Harries v. Thomas*, 2 M. & W. 32), or not included in the submission (*Poyner v. Hatton*, 7 M. & W. 211; *Skipper v. Grant*, 10 C. B., N. S. 237), or decide as to persons who are not parties to the submission (*Fisher v. Pimbley*, 11 East, 188), or direct an act to be done by a stranger (*Cooke v. Whorwood*, 2 Saund. 337; *Lee v. Elkins*, 12 Mod. 585), or order something to be done which would be a trespass upon the land of a stranger (*Turner v. Swainson*, 1 M. & W. 572; *Lewis v. Rossiter*, 44 L. J., Ex. 136), or direct any acts to be done affecting the property of a stranger, unless they are conditional upon the stranger's consent

(*Taverner v. Skingley*, Roll. Ab. "Arb." E. 3; *Nicholls v. Jones*, 6 Ex. 373; 20 L. J., Ex. 275), the award, as to the excess of jurisdiction, will be bad. An arbitrator may, however, make the performance of some act by a stranger a condition precedent to some other act to be done by one of the parties. (*Kirk v. Unwin*, 6 Ex. 908; 20 L. J., Ex. 345.)

When the jurisdiction of the arbitrator is to attach upon the happening of certain conditions, it is essential to his power to make an award that those conditions should happen. Thus, in the case of a referee of a boat race, it was necessary to enable him to award the stakes that there should be a race or a start, and, as under the circumstances the court thought that a "start" in the proper sense of the term was impossible, the condition which constituted the foundation of the referee's jurisdiction never existed, and his decision was void. (*Sadler v. Smith*, 39 L. J., Q. B. 17; L. R., 5 Q. B. 40.)

Conditions to give jurisdiction not having arisen.

Where an arbitrator has by agreement of the parties jurisdiction to determine disputes which may arise as to certain matters specified in the agreement, and the parties submit to him, for his adjudication, matters not within his jurisdiction, both the arbitrator and the parties being under the misapprehension that the matters so submitted are within his jurisdiction, the award is good. (*Thames Ironworks, &c. Co. v. The Queen*, 10 B. & S. 33; 20 L. T., N. S. 318.) It would, in fact, be treated as a parol submission of the matters not within the agreement. (*Ib.*)

Common mistake as to matters referred.

An award made in favour of a person who is a stranger to the submission is bad unless it be beneficial

Award in favour of a stranger.

the party entitled to receive satisfaction, and the advantage to the party should appear on the face of the award. (*Bird v. Bird*, 1 Salk. 74; *Laing v. Todd*, 13 C. B. 276.) But an award has been held good that

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Matters arising after the submission.

An arbitrator may not award the payment of a debt which has accrued after the parties entered into the submission (*Banfil v. Leigh*, 8 T. R. 571), or the payment of rent not due at the date of the award. (*Barnardiston v. Fowler*, 10 Mod. 204; *Lewis v. Rossiter*, 44 L. J., Ex. 136; 23 W. R. 832.)

It was referred to an arbitrator to determine of and concerning all matters of account then depending between A. and B., and the arbitrator awarded that no partnership existed between A. and B. in respect of the W. C. farm; and that A. should pay to B. the sum of 1,371*l.* 17*s.* due from him to B. in respect of shares in the C. Company; and that on payment of such sum B. should deliver to A. 118 shares in the said company held by him as collateral security for the said sum; the award was held not to exceed the arbitrator's authority. (*Harrison v. Lay*, 13 C. B., N. S. 528.)

Equitable arrangement in lieu of decision.

An arbitrator must decide the actual questions and matters referred to him, and may not in lieu thereof award what he thinks is an equitable arrangement. (*Anon.*, *Dyer*, 242 a; and see *Re Green and Balfour*, ante, pp. 75, 164.)

Implied power to give directions.

An arbitrator may in his award give any directions (provided they are not illegal, or to be performed by

strangers) necessary to decide the points submitted to him (*Pascoe v. Pascoe*, 3 Bing. N. C. 898); but unless there be some clause empowering him to say what shall be done, or the nature of the reference imply or require it, the arbitrator is rarely justified in giving any particular directions respecting property in dispute. Thus, in a reference touching the sufficiency of a doubtful title, it was held that the arbitrator was not justified in awarding that the purchaser should take it with all its faults (*Ross v. Boards*, 8 A. & E. 290); and in a dispute concerning the right to fixtures, he was held not to be empowered to order their replacement. (*Priee v. Popkin*, 10 A. & E. 139.) So, on a reference as to rent, an arbitrator cannot award a power of distress unless expressly authorised to do so. (*Pascoe v. Pascoe*, *supra*.)

On a submission of all matters in difference between partners, the arbitrator may, as we have seen, award a dissolution of the partnership (*ante*, pp. 59, 75; *Green v. Waring*, 1 W. Bl. 475; *Hutchinson v. Whitfield*, Hayes (Ir. Ex.), 78), but he is not bound to do so. (*Simmonds v. Swaine*, 1 Taunt. 549.) An arbitrator who had authority to decide on what terms a partnership agreement should be cancelled, directed, amongst other things, that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner, was held not to have exceeded his authority (*Barton v. Wigley*, 1 Bing. N. C. 665); and where a submission empowering an arbitrator to settle terms of dissolution provided that one of the partners should still carry on the business, an award that the other should not carry on the same business within thirteen miles of the particular town was held good. (*Morley v. Newman*, 5 D. & R. 317.) In *Wood v. Wilson* (2 C. M. & R. 241) the submission gave power to the arbitrator to direct a division of the partnership effects, and contained an agreement that each of the two

What directions may be given on partnership preferences.

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partners would execute to the other conveyances according to such division. An award that one partner should purchase the share of the other was upheld.

The arbitrator has no power unless authorized by the submission to appoint a receiver to get in the partnership assets (*Lingood v. Eade*, 2 Atk. 505), neither can he direct one of the partners to pay a sum of money to himself, to be by him applied in liquidation of the debts of the firm. (*Re Mackay*, 2 A. & E. 356.)

In a more recent case, on a dissolution of partnership between A. and B., A. offered to sell his interest to B. for 20,000*l.*; B. refused, but offered to buy it for 18,000*l.*, which A. refused, and it was referred to C. to say what price should be paid by B. for A.'s interest; it was held that C. had no authority to name a price outside the limits of those two sums. (*Thomson v. Anderson*, L. R. 9 Eq. 523; 39 L. J., Ch. 468.) The principle of this case applies to any reference between vendor and purchaser.

Power to
award re-
leases.

On a general reference of all matters in difference, the arbitrator has authority to order the parties to execute mutual releases if confined to the matters referred (*Cable v. Rogers*, 3 Bulst. 311; *Ingram v. Milnes*, 8 East, 445; *Goddard v. Mansfield*, 19 L. J., Q. B. 305; 1 L. M. & P. 25); but where a cause only is referred he has no such power. (*Doe d. Williams v. Richardson*, 8 Taunt. 697.) The form of the release need not be indicated by the arbitrator (*Toby v. Lovibond*, 17 L. J., C. P. 201; 5 C. B. 770); nor should he order it to be settled by a third party. (*Goddard v. Mansfield*, *supra*.)

And con-
veyances.

Where the arbitrator has to decide upon disputes concerning real property, and he has express or implied power to direct a conveyance (*Smalley v. Blackburn Rail. Co.*, 2 H. & N. 158; 27 L. J., Ex. 65; *Johnson v. Wilson*, Willes, 248), he should specify the nature of the instrument, and may not reserve the right to name a counsel

to settle it (*Re Tandy*, 9 Dow. 1044; *Tipping v. Smith*, 2 Stra. 1024), and should direct by whom (that is, which party) and at whose expense it is to be prepared (*Standley v. Hemmington*, 6 Taunt. 561); but he need not draw it himself. (*Tebbutt v. Ambler*, 2 Dow., N. S. 677.) As property in land will not pass by an award, the arbitrator must direct a conveyance, when the object of the reference is to make any change in the ownership of land (*Johnson v. Wilson*, *supra*), though a direction for the delivery of possession of land may be enforced by the court.

Where an arbitrator in settling a deed had done so in a manner exceeding his authority, Kay, J., held that the court had jurisdiction to settle the deed, instead of referring it back to the arbitrator. (*Evershed v. Evershed*, 30 W. R. 732; 46 L. T. 690.)

Besides the implied power of an arbitrator to give directions as to matters in dispute, an express power is often inserted in submissions. Where the arbitrator "is to determine," or "shall have power to determine," what he shall think fit to be done, he is not bound to direct affirmatively that something shall be done unless he shall so think fit (*Augus v. Redford*, 11 M. & W. 69; *Nicholls v. Jones*, 20 L. J., Ex. 275; 6 Ex. 373); though it may frequently happen that such a power must be construed as compulsory, or the award would be bad, as not being final. (*Ross v. Clifton*, 9 Dow. 356; but see *Greenfield v. Edgecombe*, 7 Q. B. 661; 14 L. J., Q. B. 322.)

Express
power to give
directions.

When authorized to give directions the arbitrator must take care that they are not in excess of his authority; thus, where an action in which the plaintiff claimed a right of way (not a carriage way) was referred to an arbitrator to direct in what manner the road in question should (if at all) be enjoyed by the plaintiff, and the arbitrator awarded that the plaintiff was entitled to a right of way, including a carriage way, it was held

Directions
exceeding the
power given.

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bad as exceeding his authority. (*Hooper v. Hooper*, M'Cl. & Y. 509.) In *Bonner v. Liddell* (1 B. & B. 80), there was an agreement for a lease of a coal mine for sixty-three years from the 1st May, 1801, the lessee to be allowed three years for winning the colliery without payment of rent; and an arbitrator, being authorized to give such directions for a lease according to the terms of the agreement as he should think fit, directed a lease of sixty-three years from 1804; it was held that he had exceeded his authority, and consequently that the award was bad. Where a submission empowered the arbitrator to decide how, and by whom, and in what manner, a certain pump, yard, hedge, and ditch, respecting which disputes had arisen, should in future be enjoyed and occupied, and who should have the care and management thereof; and the arbitrator, after finding that the pump was the exclusive property of one of the parties, subject to an easement in it by the other, was held not to be authorized to partly dispose of the property in it to the other, so as to make the two disputants tenants in common. (*Boodle v. Davies*, 3 A. & E. 200.) But under a power to the arbitrator to decide the right to a certain stream of water claimed in the action, and to regulate the use of it in future, and to order and determine what he should think fit to be done, it was considered that the authority to regulate the flow of the stream in dispute incidentally and necessarily empowered the arbitrator to affect the enjoyment of other rights of the parties, and to make regulations respecting the flowing of the water in the stream in question, notwithstanding they interfered with the former enjoyment of other streams not the subject of dispute. (*Winter v. Lethbridge*, 13 Price, 533.)

Should direct
payment of
sum found
due.

When an arbitrator finds a sum to be due from the one party to the other he should give an express direction for its payment, otherwise the party liable cannot be compelled by attachment to pay (*Edgell v. Dallimore*,

11 Moore, 541; 3 Bing. 634; *Hopkins v. Davies*, 1 C. M. & R. 846; *Scott v. Williams*, 3 Dow. 508), though he may by an order in the nature of a judgment. CHAP. XII.

The arbitrator may (but need not of necessity) appoint the time and place of payment of the amount awarded to be paid by one party to the other; and may award payment by instalments. (*Kockill v. Witherell*, 2 Keb. 838.) If he order payment at a future day, he may direct the party liable to pay, to give a promissory note (*Booth v. Garnett*, 2 Stra. 1082), or a bond in a penalty, but not with a surety. (*Cooke v. Whorwood*, 2 Saund. 337.) Power to order payment by instalments, promissory notes, &c.

When an arbitrator directs payment by one party of charges for which the other is liable, he may require a bond of indemnity to be given by the former to the latter. (*Brown v. Watson*, 6 Bing. N. C. 118; *Goddard v. Mansfield*, 19 L. J., Q. B. 305.) Indemnity.

An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the submission provide, or there is some legal necessity, for his awarding separately—as, for instance, to determine the right to costs. (*Re Whitworth and Hulse*, L. R., 1 Ex. 251; 35 L. J., Ex. 149; and see *Rub v. Bryde*, 1 Ex. 151; 16 L. J., Ex. 256.) May award aggregate sum for distinct claims.

SECT. 3.—An Award must extend to all Matters referred.

Unless an award extend to all matters submitted to the arbitrator it is entirely void. If several distinct matters are referred, and the arbitrator omit to decide upon any one of such matters, the whole award is vitiated (*Randall v. Randall*, 7 East, 81; *Re Robson and Railston*, 1 B. & Ad. 723; *Bowes v. Fernie*, 4 My. & Cr. 150); thus, for instance, where an action containing two counts, one on a promissory note, the other on an Each distinct matter must be decided.

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account stated, was referred, an award on the former count, but containing no adjudication on the latter, was held bad (*Gisborne v. Hart*, 5 M. & W. 50); so where an action of ejectment was referred, and the arbitrator found that the lessor of the plaintiff was entitled to a part of the lands claimed, setting them out by metes and bounds, but said nothing as to the residue, the award was held bad. (*Doe v. Horner*, 8 A. & E. 235; *Wykes v. Shipton*, 8 A. & E. 246, n.; *Stone v. Phillipps*, 6 Dow. 247.) And where it was referred to an arbitrator, 1st, to determine all actions between the parties; 2nd, to settle the sum to be paid for articles on certain land; 3rd, to ascertain what rent was to be paid by the plaintiff to the defendant for other land; and the arbitrator made his award on the two first things referred, but took no notice of the rent, the award was set aside. (*Randall v. Randall*, *supra*.) Where an action was referred to determine not only matters in difference between the plaintiffs, on the one hand, and the defendants, on the other, but also to adjust certain claims of the defendants *inter se*, the award was set aside for not dealing with the claims of the defendants. (*Turner v. Turner*, 3 Russ. 494.)

When silence
a decision.

The question sometimes arises, when several distinct matters are included in the submission, whether an award can be supported as an adjudication upon all the matters when it is silent as to some. This depends, in the first place, upon whether the particular matter in respect of which the award is silent is one from its nature requiring an affirmative decision. If it is not, then, secondly, whether there is anything on the face of the award to negative the presumption that the arbitrator intended his award to dispose of everything submitted to him. (*Harrison v. Creswick*, 21 L. J., C. P. 113; 13 C. B. 399.) The old authorities had clearly established that if an award were made *de premissis*, or in modern language “of and concerning the premises” (or matters

referred), it would be presumed that the arbitrator intended to award on all the matters in difference. (*Ib.*; *Birks v. Trippet*, 1 Saund. 32; *Jewell v. Christie*, 36 L. J., C. P. 168; L. R., 2 C. P. 296; *Perry v. Mitchell*, 12 M. & W. 803.) The later authorities have established that the expression *de premissis* is quite unnecessary, and that the courts will assume that the award was made on all matters submitted to the arbitrator unless it appear on the face of it that it was not so made. (*Re Duke of Beaufort and the Swansea Harbour Trustees*, 29 L. J., C. P. 241; 8 C. B., N. S. 146; *Reg. v. Metropolitan Rail. Co.*, 48 L. T. 369, *per* Huddleston, B., affirmed, 50 L. T. 6.) The following was laid down as the true rule by Parke, B., in *Harrison v. Creswick*, *supra*: “Where there is a further claim made by the plaintiff or a cross demand set up by the defendant, and the award, professing to be made of and concerning the matters referred, is silent respecting such further claim or cross demand, the award amounts to an adjudication that the plaintiff has no such further claim, or that the defendant’s cross demand is untenable; but where the matter so set up from its nature requires to be specifically adjudicated upon mere silence will not do.” And where, in a submission under the L. C. C. Act, 1845, the arbitrator was to determine what sum should be paid for the purchase of certain land, and what, if any, sum for severance damage; and he, by his award, after reciting the submission, and that he had considered the matters so referred to him, awarded—but not *de premissis*—a sum to be paid for the purchase of the land, without saying anything as to the severance damage, the court held the award good; and that the arbitrator, by his silence, had negatived any right to compensation for severance damage. (*Re Duke of Beaufort and the Swansea Harbour Trustees*, *supra*.)

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When silence
not a decision.

Silence, however, is not sufficient where the nature of the claim requires an affirmative decision.

If the arbitrator is to direct how the costs are to be paid the award will be bad if he omit to direct as to them. (*Richardson v. Worsley*, 5 Ex. 613; 19 L. J., Ex. 317.) If the matter about which the award is silent were the subject of an action which it was necessary to dispose of in order to distinguish what costs were to be paid silence would not do. (*Jewell v. Christie*, 36 L. J., C. P. 168, *per* Willes, J.) So, if the arbitrator is to find on any fact, and omit to do so; thus, it being disputed whether A. had been in partnership with B., and if so, whether and when it had been put an end to, an award that if a partnership ever existed it was terminated by consent, was held to be bad as not deciding the question of the existence of the partnership. (*Bhear v. Harradine*, 7 Ex. 269; 21 L. J., Ex. 127.) Where a submission authorized the arbitrator to set aside certain deeds, and gave him power to direct what should be done, and he awarded that certain specified deeds should be set aside, "if and so far as the same are in force, and if and so far as I have jurisdiction to set the same aside, and if I have no jurisdiction to set them or any of them aside, I declare that the rest of my award is yet to stand," was held an inconclusive award. (*Nickels v. Hancock*, 7 De G. M. & G. 300.)

Under a submission of a dispute on a building contract, where the arbitrators were to award on alleged defects in the building, on claims for extra work and for omissions, and to ascertain what balance, if any, might be due to the builder, an award ordering a gross sum to be paid to the builder, without any decision on the defects, was held bad. (*Re Rider*, 3 Bing. N. C. 874.)

Award sufficient if comprising all

Where the submission is of all matters in difference, without specifying them, the arbitrator need only make

differences of
which arbit-
rator had
notice.

his award of such matters as he had notice of, for though there be other things in controversy not included in the award, yet, if the arbitrator had no notice of them, his award is good. (*Risden v. Inglet*, Cro. Eliz. 838; *Rees v. Waters*, 16 M. & W. 263; *Smith v. Johnson*, 15 East, 213; *Day v. Bounin*, 3 Bing. N. C. 219; *Duke of Beaufort v. Welch*, 10 A. & E. 527.) If, however, he do not make his award of all things within the submission of which he had notice the award will be void (*Mitchell v. Stareley*, 16 East, 58; *Stone v. Phillipps*, 6 Dow. 247); and on its being clearly shown that these things were brought before him *as* matters in dispute (*Martin v. Thornton*, 4 Esp. 180; *Erskine v. Wallace*, 12 W. R. 134; *Pinkerton v. Caslon*, 2 B. & A. 704; *Hancock v. Reid*, 21 L. J., Q. B. 78), and that he did not award upon them, the court will set aside the award. (*Samuel v. Cooper*, 2 A. & E. 752.) But it must appear clearly upon the award (*Aitcheson v. Cargey*, 2 Bing. 199) that the arbitrator did not take such matters into his consideration and include them in his award. (*Dunn v. Warlters*, 9 M. & W. 293; *Re Gillon and The Mersey Navigation Co.*, 3 B. & Ad. 493; *Re Marsh*, 16 L. J., Q. B. 330.) Whether the award specifically notice every matter in difference or not is immaterial, provided the arbitrator has in fact decided upon all matters in difference submitted to him. (*Gray v. Gwennap*, 1 B. & A. 106; *Hayllar v. Ellis*, 6 Bing. 225; *ante*, p. 172.)

If several distinct matters and cross claims are referred, and the arbitrator simply award payment of one sum, it will be understood to mean in respect of all the matters referred to him. (*Re Gillon and The Mersey Navigation Co.*, *supra*.) So where a cause and all matters in difference were referred, and the arbitrator awarded that, on a settlement of all the matters in difference, there was due a specified sum from the defendant to the plaintiff, it was held sufficient. (*Bradley v. Phelps*, 21 L. J., Ex. 310.)

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When a power
only to decide
is given.

If a power only is given to an arbitrator to award upon any matter, he is not bound to make any award as to that (*Angus v. Redford*, 11 M. & W. 69; *Wrightson v. Bywater*, 3 M. & W. 207); and if he award defectively upon it, the award will not thereby be rendered bad, but the defective part will be rejected. (*Nicholls v. Jones*, 6 Ex. 373; 20 L. J., Ex. 275.) It has been held that an agreement that an arbitrator "shall and may" award upon certain matters is imperative upon him, and that he must. (*Crump v. Adney*, 1 C. & M. 355.)

Misapprehen-
sion of arbi-
trator.

It will not save an award, void through omitting to decide some of the matters submitted, that the arbitrator supposed the omitted matters were not in difference, or not within the scope of the submission. (*Samuel v. Cooper*, 2 A. & E. 752.) Thus, where all matters in difference were referred, and the arbitrators declined to award concerning a certain claim to an annuity, as they thought they were precluded from so doing by reason of a suit pending in chancery concerning it, the award was declared void. (*Bowes v. Fernie*, 4 My. & Cr. 150.)

Deciding be-
tween all the
parties.

The award will be bad if it omit to adjudicate between all the parties to the reference. (*Winter v. White*, 2 Moore, 723.) Thus, where three persons, A., B., & C., on one side, and D. on the other, submit all differences and disputes between them to arbitration, an award relating to disputes between A. and B. only of one part, and D. of the other, is bad for omitting to decide between C. and D. (*Harris v. Paynter*, Rolle, Ab. "Arb." O. 8; and see *Rees v. Waters*, 16 M. & W. 263; *Turner v. Turner*, ante, p. 172.)

SECT. 4.—*An Award must be certain.*

An award to be binding must be certain, that the parties may be able to gather from it clearly what they

have to perform, and that the court may see that the arbitrator has not exceeded his authority. It must be certain both as to the finding itself and as to the things ordered to be done.

The courts will strive to hold an award to be certain, and will not presume it to be uncertain. (*Wood v. Griffith*, 1 Swanst. 52.) The uncertainty must expressly appear on the face of the award or by averment. It will be sufficient if it is certain to a common intent, that is, if it show such a certainty as was contemplated by the parties in the submission (*Hawkins v. Colclough*, 1 Burr. 274); and if, on a fair and reasonable interpretation of the terms employed, a man of common understanding can comprehend the meaning and intention of the arbitrator. (*Cargey v. Aitcheson*, 2 B. & C. 170; 3 D. & R. 433.)

When an award will be held certain

If, by manifest implication, or necessary import, that appear which, if positively expressed, would render the award good, that is sufficient to support it. (*Linnem v. Williamson*, Rolle, Ab. "Arb." R. 16; *Baily v. Curling*, 20 L. J., Q. B. 235.) Thus, a direction to a mortgagee to re-assign mortgaged lands will be sufficient, though the period for which the re-assignment is to be, is not named, the courts presuming that the whole interest mortgaged is intended (*Rosse v. Hodges*, 1 Ld. Raym. 233); and, a direction that a nuisance on the defendant's soil is to be removed, without saying by whom, has been held certain, as the courts will presume that the owner of the soil is the person intended. (*Armitt v. Breame*, 2 Ld. Raym. 1076.)

Manifest implication.

An award, on a reference of a cause and all matters in difference, that "nothing is due to the plaintiff," was held sufficiently certain, and equivalent to a finding that the plaintiff had no right to recover in the action (*Dickins v. Jarvis*, 5 B. & C. 528); so, in a reference of an action in which there were several specific claims,

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was an award that "the plaintiff has no cause of action." (*Hayllar v. Ellis*, 6 Bing. 225; 3 M. & P. 553; *Jackson v. Yabsley*, 5 B. & A. 848.) But, an award that the defendant had overpaid the plaintiff a specified sum, was held sufficiently doubtful to justify the refusal of an attachment. (*Thornton v. Hornby*, 8 Bing. 13; 1 M. & Sc. 48.)

Matters not in
controversy.

An award will not be bad for uncertainty upon a point about which there is no controversy between the parties. (*Cargey v. Aitcheson*, 2 B. & C. 170; *Plummer v. Lee*, 2 M. & W. 495.)

Award in
terms of sub-
mission.

An arbitrator fulfils his task if he decide the very matters submitted and about which the parties differ (*Miller v. De Burgh*, 19 L. J., Ex. 127); what the parties treat as certain and ascertained, he may assume to be, and deal with as such; and though the award might to a stranger be ambiguous or uncertain, it will be valid if it determine such matters as it could have been fairly intended by the submission that he should decide. Where an arbitrator had power to settle at what price the defendant should purchase the plaintiff's "property," and the arbitrator fixed a certain price at which the defendant should purchase the plaintiff's "said property," it was held that this was sufficiently certain, as the property was not a matter in difference. (*Round v. Hatton*, 10 M. & W. 660.)

An award upon a submission of differences between an administrator and the next of kin of his intestate, directed that the administrator should pay to the next of kin their distributive shares, and it was held sufficient; the degree of relationship, and consequently their aliquot shares of the intestate's estate, not being shown to be in dispute. (*Perry v. Mitchell*, 12 M. & W. 792.) On the same principle, where an action of debt on a money bond, to which the only plea was payment by a co-obligor, was referred, and the arbitrator ordered a verdict

to be entered for the plaintiff, without stating what amount was due on the bond, the award was held sufficient. (*Cayne v. Watts*, 3 D. & R. 224.)

In an action against an executor, where the arbitrator found a certain sum due to the plaintiff on the balance of accounts, and awarded that the defendant should pay it, out of assets, on a given day, it was held to be sufficiently certain without stating expressly that defendant had assets to that amount. (*Love v. Honeybourne*, 4 D. & R. 814.)

If an award completely decide a matter, the addition of an imperfect direction which may be rejected as surplusage will not invalidate the award. (*Miller v. De Burgh*, 19 L. J., Ex. 127; 4 Ex. 809; *Barton v. Ranson*, 3 M. & W. 322.) But, it will be otherwise, if the matter which is left in uncertainty, is so connected with the rest of the award as to be a material part of the whole thing awarded, although, if it had been originally omitted, the award would have been sufficient. (*Re Marshall and Dresser*, 12 L. J., Q. B. 104; 3 Q. B. 878.)

Direction on immaterial point.

A *prima facie* uncertainty or want of conclusiveness in an award does not vitiate it, if it be capable of being rendered certain or conclusive,—the maxim *id certum est quod certum reddi potest* applying in such cases,—and the award may be bad or good according to the event. (*Cargy v. Aitcheson*, 2 B. & C. 170.) Thus, where a specified sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was held sufficiently certain, as the time would be computed from the delivery of the award. (*Armitt v. Breame*, 2 Ld. Raym. 1076.) So, where a bond was ordered to be delivered up to be cancelled within a certain time from the date of it, without stating the date, it was considered sufficient. (*Bell v. Gipps*, 2 Ld. Raym. 1141.) In *Re Boyes and Bluck* (13 C. B. 652; 22 L. J., C. P. 173) an award that A.

Award sufficient, when it can be rendered certain.

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should "forthwith" execute conveyances to C., and that C. should "forthwith" execute releases to A., was upheld, as the latter *forthwith* was to be construed to mean as soon as the former direction had been obeyed. And, a direction to pay money or execute a release, is sufficiently certain though it mention no time, for it must be performed within a reasonable time. (*Freeman v. Bernard*, 1 Salk. 69.) An award that one party to a reference relating to a voyage should pay his share of the expenses of the voyage, and allow on account his proportion of the loss which should happen to the ship during the voyage, was held good, as both expenses and loss might be reduced to a certainty. (*Beale v. Beale*, Rolle, Ab. "Arb." H. 14.) So, an award that two persons should pay a debt in proportion to the shares which they held in a ship (*Wohlenberg v. Lageman*, 6 Taunt. 254), and, a direction for payment of "interest since the last settlement of accounts" (*Plummer v. Lee*, 2 M. & W. 495; 5 Dow. 755), are sufficiently certain. And, an award was held certain, that directed one party to pay to the other all such monies as he had expended about the prosecution of a suit, for that might be ascertained by showing, in fact, what had been laid out. (*Hanson v. Liversedge*, 2 Vent. 242; *Fox v. Smith*, 2 Wils. 267.) But a direction to pay all reasonable expenses which the plaintiff has sustained about a suit (*Bargrave v. Atkins*, 3 Lev. 413), or to pay the charges spent in making an award (*Pinkny v. Bullock*, cited 3 Lev. 413), is void for uncertainty.

Award upon a contingency not clearly defined.

It being referred to two surveyors to fix the price of land, and they stated the amount in their valuation, but directed that if there should prove to be a mistake in the admeasurement an addition or deduction should be made at the rate of 8*l.* or 42*l.*, according as the land lay on one side or the other of a certain line, which they did not accurately define, the valuation was held

void for uncertainty. (*Hopcraft v. Hickman*, 2 S. & S. 130.) CHAP. XII.

If, in awarding a payment of money, the arbitrator, instead of naming the amount, indicate the manner in which it is to be estimated, it will be good; but the manner must be precisely pointed out, for an award between A. and B., concerning certain quarters of malt delivered by A. to B., that B. should pay to A. so much for each quarter of malt as a quarter of malt was then sold for, was held bad, because no mention was made of any market or place where the price was to be estimated. (*Hurst v. Bainbridge*, Rolle, Ab. "Arb." Q. 7.) This decision is not affected by *Waddle v. Downman* (12 M. & W. 562), for there the arbitrator had only to decide whether or not the plaintiff was to be allowed the value of certain articles at the market price of pig iron, as distinguished from machinery, and, as he decided affirmatively, that was such a certainty as the parties may fairly be considered to have contemplated, without his naming the market.

Award giving the rule for ascertaining the money to be paid, good.

The court will look to the evident or necessary intention of the arbitrator, in deciding upon the certainty of an award: thus, where an action of ejectment was referred, and the arbitrator, after reciting the submission, awarded thus, "I award and determine that the verdict in the said cause be entered for the lessors of the plaintiff,"—instead of for the plaintiff,—the court held that the arbitrator must be understood to have finally determined the cause in favour of the plaintiff. (*Law v. Blackburn*, 23 L. J., C. P. 28; 14 C. B. 77; *Mays v. Cannel*, 24 L. J., C. P. 41; 15 C. B. 107.)

Intention of the arbitrator to be regarded.

But there must be a reasonable precision, and an award is void for uncertainty that leaves in doubt what it decides, *e.g.*, an award that orders one party to pay so much money as is due in conscience (*Watson v. Watson*, Sty. 28), or to pay "certain task and days' work" (*Pope*

Award bad if doubtful what it decides.

CHAP. XII. v. *Brett*, 2 Saund. 292), or to pay so much as certain land is worth (*Titus v. Perkins*, Skin. 247), or to pay the moiety of a certain debt for which A. is bound (*Gray v. Gray*, Rolle, Ab. "Arb." Q. 2), without in each case stating the amount; or to pay arrears of rent, without stating from when payable. (*Massy v. Aubry*, Sty. 305.) So also is an award that the defendant shall deliver up certain goods particularly named, and three boxes, and several books, without naming the books (*Cockson v. Ogle*, Lut. 550); or, that a "certain writing obligatory" shall be delivered, without describing it (*Bedam v. Clerkson*, 1 Ld. Raym. 123); or, that one party shall give security for money, without specifying the nature of the security (*Duport v. Wildgoose*, 2 Bulstr. 260; *Thinne v. Rigby*, Cro. Jac. 314; *Tipping v. Smith*, 2 Str. 1024, but see 1 Taunt. 554); or, that A. shall pay whatever sum B. shall be compelled to pay in respect to a certain bill of exchange. (*Graham v. D'Arcy*, 6 D. & L. 385; 18 L. J., C. P. 61.)

Or the
amount.

And there must be certainty in regard to all matters included in the reference about which there is any difference, and, in regard to which, no presumption would by necessary intendment otherwise arise to fix them with certainty. Where arbitrators were, in a certain event, to order payment in reduction of a mortgage debt, and they ordered payment of the mortgage debt, but did not find the amount, which was a matter to be decided by them, the award was held bad. (*Hewitt v. Hewitt*, 1 Q. B. 110.)

Or how it
decides.

If it is doubtful how the award has decided the matter referred, it will be set aside as uncertain. An award that a certain amount is due to the defendant from A., B., and C., some or one of them, and directing the amount to be paid by them, some or one of them is uncertain. (*Rainforth v. Hamer*, 25 L. T. 247.) Where an action of assumpsit and all matters in difference were referred at *nisi prius*, with power to the arbitrator to direct a verdict

to be entered for either party, and the arbitrator directed a verdict to be entered for the plaintiff, without saying for what amount: the court held the award bad for uncertainty, although it also awarded that the defendant was indebted to the plaintiff in 260*l.*, because that sum might have been due with respect to the matters in difference, and not in the cause. (*Martin v. Burge*, 4 A. & E. 973; 6 N. & M. 201.)

A fortiori, an award which leaves it in doubt as to any of the questions whether they were meant to be and have been disposed of, cannot be maintained. (*Wakefield v. Llanelly Rail. Co.*, 13 W. R. 823.) A suit having been commenced to rescind an agreement, it, and all matters in difference between the parties, were referred to arbitration. The award merely directed as to the suit, that each party should pay his own costs, but made no further determination as to the agreement, and it was held to be bad, for although the court considered that it was probably the arbitrator's intention to put an end to the suit, they could not say, in point of law, that he had done so. (*Re Tribe and Upperton*, 3 A. & E. 295.)

Or whether it decides at all.

An award that one of two persons shall do an act is void for uncertainty (*Lawrence v. Hodgson*, 1 Y. & J. 16), but, an award that a person shall do one of two things, is not uncertain if either thing is capable of being performed. (*Lee v. Elkins*, 12 Mod. 585; *Simmonds v. Swaine*, 1 Taunt. 549; *Oldfield and Wilmer's Case*, 1 Leon. 140; *Wharton v. King*, 2 B. & Ad. 528.) And an award, conditional upon the performance or non-performance of a certain act, is not uncertain: thus, an award that one party should pay the other 20*s.* on condition that each should acquit the other (*Linfild v. Ferne*, 3 Lev. 18); and that A. should pay 105*l.* on a certain day, and if he did not, that he should pay 110*l.* on a certain other day (*Rolle, Ab. "Arb."* H. 8), have been held good.

Award in the alternative, or conditional.

If the award direct any acts to be done the directions Directions

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must be
specific.

must be clear and specific, that they may be strictly obeyed; therefore an award that a party shall put up certain fixtures, without defining their value or description, is bad. (*Price v. Popkin*, 10 A. & E. 139.) And, where in a reference of an action for polluting a water-course the arbitrator was to direct how the water should be enjoyed in future, and he awarded that the defendant should take all reasonable precautions to prevent the water from being rendered less fit for use by his business of a dyer, and that all refuse water from the defendant's works should, at the defendant's expense, be passed through filters, so as to be thereby effectually cleansed, so far as the same could be cleansed by the ordinary and most approved process of filtering, this was held to be uncertain, for not specifying what particular precautions should be employed. (*Stonehewer v. Farrer*, 14 L. J., Q. B. 122; 6 Q. B. 730; but see *per Erle, J., Johnson v. Latham*, 20 L. J., Q. B. 238; and see *Sharpe v. Hancock*, 7 M. & G. 354.) An arbitrator, who had to direct the apportionment of a trust estate amongst the persons entitled, after finding a certain sum due from a party, directed him to pay or account for it to the trust estate; his award was held uncertain, in not specifying to whom and in what proportions the money ought to be paid. (*Re Tidswell*, 33 Beav. 213; 3 N. R. 281.) And an award which, in directing the enjoyment of land in the future, directed that the parties should enjoy it as heretofore, was held to be uncertain. (*Ross v. Clifton*, 9 Dow. 356.) But an award which recited that the parties were joint tenants of certain lands, and ordered that they should make partition by mutual conveyance, was held good, though it did not specify what moiety or part the one should have and what the other. (*Knight v. Burton*, 6 Mod. 231.)

Awarding
costs without
ascertaining

In a reference of an action, either alone or with other matters, an award of costs or any specified proportion

thereof, though the amount is not ascertained, is sufficiently certain, and in such a case the master or other officer of the court shall tax them. (*Cargy v. Aitcheson*, 2 B. & C. 170; *Fox v. Smith*, 2 Wils. 267; *Holdsworth v. Barsham*, 31 L. J., Q. B. 145; in error, 32 L. J., Q. B. 289; *Holdsworth v. Wilson*, 4 B. & S. 1; *Sharpe v. Metropolitan District Rail. Co.*, 48 L. J., Q. B. 325; 50 L. J., Q. B. 14; 4 Q. B. D. 645; 5 App. Cas. 425; *Lewis v. Rossiter*, 44 L. J., Ex. 136.)

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them, when
certain.

If the arbitrator, without specifying definitely the amount of costs, give the rule for computing them, the award is sufficiently certain. (*Higgins v. Willes*, 3 M. & Ry. 382.)

Where an arbitrator finds facts to raise a question of law he should find them with such certainty that the court may draw their conclusion of law, and he should not leave any fact to be intended by the court. (*Watson on Awards*, 209.)

Finding facts
to raise a
question of
law.

SECT. 5.—*An Award must be final.*

An award must finally determine all matters contained in the submission, requiring decision, and if it leave the final decision of some of the matters to be ascertained in the future, it will not be binding on the parties. But where differences having arisen between two railway companies, proprietors of joining lines, as to the interchange and transmission of traffic, it was, under the provisions of a special Act, referred to arbitrators to determine what arrangements should be made by the two companies or either of them for affording proper facilities for such interchange and transmission, and the arbitrators made their award giving specific directions as to future traffic arrangements, but no directions as to the length of time for which such arrangements were to last, it was held not to be thereby defective, as the directions

Award must
be final.

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would continue until new arrangements were made under the arbitration clause in the said Act. (*Eastern Union Rail. Co. v. Eastern Counties Rail. Co.*, 22 L. J., Q. B. 371; 2 E. & B. 530.) And an arbitrator, having to decide upon the depth at which the defendant was entitled to keep a weir, awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches and no more, and added that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir; it was held that the award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir by which the water could be let off. (*Johnson v. Latham*, 20 L. J., Q. B. 236; 2 L. M. & P. 205.) Where two parties agreed to be bound by the opinion of a professional man upon the construction of an Act of Parliament, and he gave his opinion in favour of one, such opinion was considered final and conclusive, though it recommended the printed statute to be compared with the Parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. (*Price v. Hollis*, 1 M. & S. 105.)

Final as the
case admits.

If the award be as final as the nature of the thing will admit, it is sufficient. (*Philips v. Knightley*, 2 Stra. 903.) So, if it award the very thing that the parties have agreed shall be done. (*Miller v. De Burgh*, 19 L. J., Ex. 127; 4 Ex. 809.)

Arbitrator
can make but
one award,

An award must be one entire instrument or direction, for an arbitrator can make but one award, even within the time limited for his award, unless by express or implied authorization in the submission. (*Wrightson v. Bywater*, 3 M. & W. 206.) Thus, where by an order of reference a cause and all matters in difference between A. and B. were referred, and by a subsequent order, made

after the first reference had commenced, it was directed that C. should be made a party thereto as if he had been an original party, and that a cause between A. and C. and all matters in difference between A., B., and C., each and every of them, jointly and severally, should be referred to the same arbitrator; and the arbitrator made two awards, in one of which he awarded that A. was indebted to B. without mentioning C., and in the other that A. was indebted to C. without mentioning B.; it was held that both awards were bad, and that the arbitrator had not properly performed his duty, as there was no one award determining all matters in difference between all the parties. (*Winter v. White*, 2 Moore, 723.) But where a general verdict was taken for the plaintiff on all the issues in an action, subject to a reference of that and another cross action between the same parties in which issue had not been joined, with power to the arbitrator to make an award or certificate, and the arbitrator delivered two papers containing two certificates, it was held that it might be intended that both were made at the same time, and, if so, they would be one instrument containing the decision of each cause, written on separate papers for the purpose of being applied to the separate causes. (*Smith v. Reece*, 6 D. & L. 520.)

If empowered by the submission the arbitrator may make several awards. (*Dowse v. Cox*, 3 Bing. 20; *Wrightson v. Bywater*, 3 M. & W. 199.) Arbitrators in a reference under the Railway Companies Arbitration Act, 1859, may make several awards, each on part of the matters referred. (22 & 23 Vict. c. 59, s. 21.)

We have seen (*ante*, sect. 3) that where several matters are referred, and some only are decided, the award is bad, and it is bad because it is not a final settlement of the matters in difference between the parties. (*Samuel v. Cooper*, 4 N. & M. 520; *Ross v. Boards*, 8 A. & E. 290.)

unless empowered by the submission to make several.

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Conditional
finding.

Where an arbitrator set out the facts on the face of his award, and then awarded in favour of the defendant, but concluded that if the court should be of opinion upon the facts that the plaintiff was entitled to recover, then he awarded in favour of the plaintiff, it was held that the arbitrator had come to a final conclusion, and expressed his own opinion, and that the last clause might be rejected. (*Barton v. Ranson*, 3 M. & W. 322.)

Awarding a
voluntary
performance
is bad.

An award leaving the result conditional upon the voluntary performance of an act by the one party is generally bad. (*Crofts v. Harris*, Carth. 187.) Thus an award that if A. give up his shares B. shall pay him a certain sum is bad; it should be that A. shall give up his shares and that B. shall pay the sum (*Baillie v. Edinburgh Gas Co.*, 3 C. & F. 639); and a direction that the plaintiff should accept a bill of sale was held bad because it did not direct the defendant to give the bill of sale. (*Clapcott v. Dary*, 1 Ld. Raym. 611.) But an award of a lease of certain premises to the defendant, and providing that if the rent awarded to be paid by him, were not paid, the award should be void, was held good on the ground that the conditional award became absolute if the defendant paid the rent, and if he did not he lost the enjoyment by his own default. (*Furser v. Proud*, Cro. Jac. 423.)

Proviso void-
ing the award
is bad.

An award containing a proviso that upon the happening of a subsequent event (whether the event is within the control of the parties or not) the award shall be wholly void is bad, as not being final (*Kinge v. Finis*, Sid. 59); thus a proviso that if either party were dissatisfied with the award and within a specified time paid a small sum to the other the award should be void and the parties be at liberty to proceed against each other as before the award, was held not final. (*Sherry v. Richardson*, Pop. 15.)

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Where the award is to be altered by the subsequent oath or proof of one of the parties, this vitiates the whole award; thus an award, that if the plaintiff on account prove certain articles against the defendant, then he shall pay so much money as the plaintiff was dammified thereby, is not final. (*Selby v. Russell*, Comb. 456.) So an award depending on something to be subsequently ascertained is bad: thus an award that a certain sum should be paid in lieu of tithes provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier then a different sum, was held void. (*Goode v. Waters*, 20 L. J., Ch. 72.)

An award to be altered by subsequent proof.

Any delegation or reservation of their authority by arbitrators will vitiate their award, for an award would not be final that left anything to the future judgment or power of the arbitrators or of any other person; thus a direction to leave so many trees on land, for house-bote and hedge-bote, as the arbitrator upon advice with counsel shall appoint (*Thinne v. Rigby*, Cro. Jac. 314); or a proviso that doing of the a certain act awarded shall depend upon the after-given consent of the arbitrator (*Lindsay v. Lindsay*, 11 Ir. C. L. Rep. 311), is bad. So an award that as to the whole or part of the matters submitted the parties shall abide by the decision of a third person (*Lower v. Lower*, Rolle, Ab. "Arb." H. 11; *Johnson v. Latham*, 19 L. J., Q. B. 329); as, for example, an award that defendant should within a time named put certain premises in repair to the satisfaction of M. (*Tomlin v. Mayor of Fordwich*, 5 A. & E. 147.) An award that the defendant should pay to the plaintiff a certain sum unless he should within twenty-one days exonerate himself by affidavit from certain payments and receipts, and in that case he was to pay a less sum, was held to be bad, as it left the sum to be decided by the defendant himself. (*Pedley v. Goddard*, 7 T. R. 73.) So an award that A. should pay B. 50l.,

Delegation or reservation of authority.

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and beg his pardon at such time and place as B. should appoint, was void for delegating the appointment of time and place to B. (*Glover v. Barrie*, 1 Salk. 71.)

An arbitrator, when he awards a conveyance to be executed, need not draw it himself, but he should indicate the form of it, and not leave that in the discretion of the draftsman employed; thus an award ordering certain parties to execute such conveyances, releases, and assurances as should be necessary to pass their interest, and not stating the form of conveyance, but providing that if any dispute should arise as to the form it should be decided by such counsel or attorney as the arbitrator should appoint, was void. (*Re Tandy*, 9 Dow. 1044; *Goddard v. Mansfield*, 19 L. J., Q. B. 305.)

Any proviso in an award by which an arbitrator professes to reserve to himself power over future differences is void. (*Manser v. Heaver*, 3 B. & Ad. 295.)

Reserving or
excepting
matters re-
ferred.

Where part of the matter in dispute is reserved for future litigation the award is not final. (*Turner v. Turner*, 3 Russ. 494.) And where, on a reference arising out of a dissolution of partnership, the arbitrator directed that a matter referred as to liability on a promissory note should not be affected by the award, the award was held bad. (*Wilkinson v. Page*, 1 Hare, 276.) But where a cause and all matters in difference were referred, and the arbitrator awarded as to all except a certain claim by the plaintiff for a loss on hats, and as to that he found that no sufficient evidence was laid before him to show that any loss had been sustained at the date of the reference, this was held sufficiently final. (*Cockburn v. Newton*, 2 M. & G. 899; 9 Dow. 676.) In a similar case the award, after deciding that the plaintiff had no cause of action, stated that it was not intended to exclude him from the receipt of a certain commission to which he would subsequently become entitled under an agreement; the court held it sufficient,

as it in fact determined that there was nothing due on the agreement at present, and the arbitrator was only empowered to decide on matters up to the date of the submission. (*Harding v. Forshaw*, 1 M. & W. 415.)

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SECT. 6.—*An Award must not be impossible, unreasonable, inconsistent, or illegal.*

An award that one of the parties shall do an act out of his power is bad; as that one party shall deliver up a deed which is in the custody of another (*Lee v. Elkins*, 12 Mod. 585); or that he shall procure a stranger to be bound with him as a surety. (*Thirshy v. Helbot*, 3 Mod. 272.) But it is no objection to the award that it is difficult for the party to perform it from the accidental narrowness of his circumstances, as if he be to pay 20*l.* when he has no property. And an award of an impossible act with a possible alternative is good. (*Wharton v. King*, 2 B. & Ad. 528.) If an act awarded is possible at the time of the award, the party is bound by the award though the act afterwards becomes impossible by the conduct of himself or a stranger. (Com. Dig. "Arb." E. 12.)

An award bad as impossible.

An award must be reasonable. Instances of unreasonable awards are furnished in the old cases. Thus an award that one party shall give a horse or release his right to certain land in satisfaction of a trespass, or erect a stile on the land of another, is so unreasonable as not to be binding upon the party. (*Ross v. Boards*, 3 N. & P. 382.) So an award that one party shall serve the other two years in satisfaction of an action (Rolle, Ab. "Arb." B. 12), or pay the other 300*l.* to repair his honour for calling him a bankrupt knave. (3 Rep. in Ch. 76.)

Award unreasonable.

If one part of an award be inconsistent with the other it will be bad, as where an arbitrator awarded

Contradictory.

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that A. should pay B. 100*l.*, and that both should give general releases, and that at a subsequent time B. should pay A. 20*l.*, the award was held bad. (*Storke v. De Smeth*, Willes, 66.) So in an action founded on fraud, where the arbitrator expressly acquitted the defendant of all fraud, and then awarded against him. (*Ames v. Milward*, 8 Taunt. 637.) But an award that the defendant should pay to the plaintiff 50*l.* towards the costs of the cause and reference, and that the plaintiff should pay his own and the defendant's costs of the same, has been held not to be inconsistent. (*Seckham v. Babb*, 8 Dow. 167 ; 6 M. & W. 129.) And where a cause and all matters in difference were referred, costs to abide the event, and the arbitrator found several of the issues inconsistently, the court held the award good, regarding all the findings after the first as hypothetical and only for the purpose of distributing the costs. (*Duke of Beaufort v. Welch*, 10 A. & E. 527.) In a reference of an action of debt the pleas of *nunquam indebitatus* and payment may both be consistently found for the defendant, for if on a trial the plaintiff had failed in proof of his case, and the defendant proved payment, the verdict would be entered for the defendant on both issues. (*Malony v. Stockley*, 2 Dow., N. S. 122 ; 4 M. & G. 647 ; and see *Cooper v. Langdon*, 9 M. & W. 60 ; 10 M. & W. 785.)

In an action of trespass referred by order of *nisi prius*, to which the defendant pleaded not guilty, and secondly a justification, the arbitrator (who was a layman) awarded "that as the defendant had not proved his plea the verdict ought to stand," and then added a number of reasons which could not be considered satisfactory, the court held the adjudication sufficient, and declined to consider the sufficiency of the reasons assigned by the arbitrator. (*Archer v. Owen*, 9 Dow. 341.)

If an arbitrator direct an act to be done which is contrary to the law the award is so far bad. (*Abder v. Savill*, 5 Taunt. 454; *Turner v. Swainson*, 1 M. & W. 572.) Thus an award directing a party to commit waste or a trespass, or to do an act amounting to a crime, is bad. But it seems that if the doing of an act is against some rule of practice merely it is not bad. (*Re Badger*, 2 B. & A. 691.) If a sum of money be awarded to be paid on a Sunday the award is not bad. (*Hobdell v. Miller*, 6 Bing. N. C. 292; 2 Scott. N. R. 163.) If a sum awarded appear on the face of it to have arisen out of some illegal transaction the award will be bad *pro tanto*. (*Aubert v. Maze*, 2 B. & P. 371; and see *Steers v. Lashley*, 6 T. R. 61.) Though it has been held that the illegality must be apparent on the face of the award. (*Cramp v. Symons*, 1 Bing. 104.)

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Illegal.

Where an award recited a clause in the submission which provided that documents should be admitted in evidence without a stamp, but it did not appear that the arbitrator had admitted any unstamped documents, the award was held good. (*Phillips v. Higgins*, 20 L. J., Q. B. 357.)

Formerly great stress was laid upon the necessity of mutuality in an award, but the decisions on this point have long ceased to have any practical value, for it is difficult to conceive any case in which, the submission itself being binding, an award extending to all matters submitted, and not exceeding the submission, would be set aside on the ground of want of mutuality.

Mutuality in an award.

SECT. 7.—Award bad in Part.

An award may be good in part and bad in part when the subject is clearly capable of being separated; and that part which is good may be enforced, provided

Award bad in part may be good for residue if all

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matters well
decided.

it be in itself a final determination of all matters submitted, and perfectly distinct from and independent of that part which is bad (*Candler v. Fuller*, Willes, 64; *Auriol v. Smith*, Turn. & Russ. 121; *Addison v. Gray*, 2 Wils. 293; *Lee v. Elkins*, 12 Mod. 585; *Stone v. Phillipps*, 6 Dow. 247; *Kendrick v. Davies*, 5 Dow. 693); and the faulty direction will be set aside or treated as null.

The good and
the bad must
be distinct.

The bad part must be wholly severable from the rest of the award. If the bad part is so mixed up with the rest that it cannot be rejected, the award is void altogether. (*Duke of Buccleuch v. Metropolitan Board of Works*, 39 L. J., Ex. 137; L. R., 5 Ex. 229, *per* Blackburn, J.; *Re Tandy and Tandy*, 9 Dow. 1044.)

“I always find a difficulty,” said Lord Denman, C.J., “in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other; and each may be varied by the view which he takes of the whole.” (*Tomlin v. Mayor of Fordwich*, 5 A. & E. 152.) This observation will indicate the difficulty of laying down any general rules as to the divisibility of awards.

Severability
of excessive
awards.

The most numerous class of cases in which the doctrine of divisibility has been allowed to operate, is where the arbitrator has exceeded his authority by awarding on matters, some within, and some beyond, the submission.

Where the
whole award
to be per-
formed by one
of the parties.

If the award is for one of the parties to do several things, some of which are beyond the submission, the award as to the latter is mere surplusage. Thus an award directing the defendant to remove certain hatches, part of which belonged to him absolutely, but in other parts of which he had only a share; at the same time providing that the award should affect the latter only so far as his interest extended, was held good as to all but that part in which the defendant might show his inability to proceed. (*Re Doddington and Bailward*, 8 L. J., C. P. 331; 7 Dow. 640.)

If the award is to be performed partly by the one and partly by the other party, but the thing awarded beyond the submission forms no part of the consideration for or element in the performance of that part which is within the submission, the excess may be rejected and the rest of the award sustained. Thus, an award that the defendant should pay a certain sum due on the banking account of the defendant with the plaintiffs, and that the plaintiffs should pay certain sums to the defendant in respect of certain other disputed accounts between the plaintiffs and the defendant and strangers, which accounts were not included in the submission, the matter not within the submission was rejected and the rest of the award held good. (*Ingram v. Milnes*, 8 East, 445.)

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Where mutual performances awarded, but are not inter-dependent.

If the excess is part of the consideration for the matters which are well awarded, but the consideration can be apportioned to the matters within the submission, the excess will be rejected. Thus an award of a release up to the time of the award is void only as to the time between the submission and the award. (*Cooper v. Pierce*, 1 Ld. Raym. 116; *Pickering v. Watson*, 2 W. Bl. 1117.) If the arbitrator award mutual releases on payment of a sum over which he has jurisdiction, and also of a sum over which he has none, the award is good as to the former. (*Kendrick v. Davies*, 5 Dow. 693.) And if an award be bad as to the direction of mutual releases where they are awarded, that will not vitiate the whole. (*Doe d. Williams v. Richardson*, 8 Taunt. 697.) These cases would be equally referable to the rule that the direction as to releases might be rejected and leave the award a complete adjudication. (See *Goddard v. Mansfield*, 19 L. J., Q. B. 305.)

Where the excess constitutes part of the consideration for the award.

If an arbitrator have no power over costs, and he assume in his award to give directions as to costs, such directions do not vitiate the award, but will be rejected and the other portions enforced. (*Mitcheson v. Cargy*,

Excess as to costs,

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13 Price, 639 ; 2 Bing. 199 ; *Kendrick v. Davies*, 5 Dow. 693 ; *Wilson v. Doolan*, 5 Ir. Jur. 136.)

or on matter
not necessary
to decide.

Where an arbitrator having power, but not being bound by the terms of the submission to give directions as to a particular matter, gives a direction which is invalid, the whole award is not thereby vitiated, but the invalid direction may be treated as surplusage. (*Nicholls v. Jones*, 20 L. J., Ex. 275 ; 6 Ex. 373 ; *Lewis v. Rossiter*, 23 W. R. 832.)

Complete de-
cision followed
by unwar-
ranted direc-
tions.

Where an arbitrator, having decided the actual matters in controversy in terms which, if they stood alone, would amount to an unimpeachable award, proceeds to give a direction which he has no power to give, the excessive direction may be disregarded. Thus, where an arbitrator without authority ordered a verdict to be entered, but the award disposed of all matters referred independently of the verdict, that part of the award was rejected and the rest held good. (*Price v. Popkin*, 2 P. & D. 304 ; *Doe d. Body v. Cox*, 15 L. J., Q. B. 317.) In like manner when the arbitrator, having found on all the issues, awarded a *stet processus*, having no authority to do so, this part of the award was held separable from the rest. (*Ward v. Hall*, 9 Dow. 610.)

Where an arbitrator, after directing the execution of certain works, and making a complete decision, proceeded to give directions as to their future repair, the latter directions were rejected. (*Johnston v. Cheape*, 5 Dow, H. L. 247.) So where an action as to the right to the enjoyment of a watercourse was referred with all matters in difference, and the arbitrator gave some directions respecting the enjoyment of the watercourse beyond the submission, the court held the award to be bad *quoad* that part only, but good for the rest. (*Winter v. Lethbridge*, 13 Price, 533.)

If the arbitrator make a complete and final award, but add reasons for his decision which are insufficient, the

reasons will be rejected. (*Archer v. Owen*, 9 Dow. 341 ; Chap. XII. and see *Re Wright*, 1 Q. B. 98.)

If an award is complete and final, a reservation of a future power to alter the award may be rejected. An arbitrator to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff and certain works to be done by the defendant : he then added, that as disputes might arise respecting the performance of the award, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part in order that a final award might be made concerning the matters in difference ; but if no proceedings were taken by the plaintiff within two months after the work was done the award then made should be final, and he enlarged the time for making his final award for six months ; it was held that the reservation of future power by the arbitrator was bad, but that the former part of the award was final and binding. (*Manser v. Heaver*, 3 B. & Ad. 295 ; and see *Goddard v. Mansfield*, 19 L. J., Q. B. 305.)

Excess in reserving power to add to the award.

If, however, the award is not in itself a complete decision of the matters in difference, a reservation of a power to complete the award, renders the entire award void. (*Re Tandy and Tandy*, 9 Dow. 1044.)

When the arbitrator mixes matters within and matters not within the submission, and awards upon them collectively, so that the court cannot distinguish how much of the finding relates to each class respectively, the whole will be bad. A distinction prevails between an award of several things and of one entire act or thing. Where one entire thing is awarded, which is not in its nature divisible, it cannot be apportioned so as to reject a faulty and support a good part thereof, but the whole will be avoided. (*Tomlin v. Mayor of Fordwich*, 5 A. & E. 147.)

Unless the excess is distinguishable whole award void.

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Thus, where one entire sum is awarded to be paid, the courts cannot enter into the question what part of the sum is and what is not within the submission; and if the arbitrator has exceeded his authority in awarding any part of an entire sum the award cannot be enforced at all. (*Auriol v. Smith*, Turn. & Russ. 121; *Watkins v. Phillpotts*, M'Cl. & Y. 393.) Where an arbitrator to whom, before issue, a cause was referred, awarded thus, "I award and direct that a verdict in this cause be finally entered for the plaintiffs with 24*l.* 12*s.* damages," the court held that he had exceeded his authority in awarding the entry of a verdict, and as the award consisted only of one sentence that direction could not be rejected and the residue considered as an award that so much was due and to be paid, and that, therefore, the award was bad. (*Jackson v. Clarke*, M'Cl. & Y. 209.) And the same where an arbitrator found an indivisible plea partly for the defendant. (*Moore v. Butlin*, 2 N. & P. 436.)

Where an arbitrator has exceeded his power by awarding costs to be taxed as between solicitor and client, if that part of the award be separable from the rest it may be rejected and the award stand; but if it be so connected with the rest as not to be separable the whole will be vitiated. (*Seckham v. Babb*, 8 Dow. 167; 6 M. & W. 129.)

Where void
part is the
consideration
for the rest.

If by the nullity of an award in any part, one of the parties cannot have the advantage intended to him as a recompense or consideration for the thing awarded against him, the award is entirely void: as where it was awarded that A. should pay to B., 25*l.*, and that B. should pay A. for certain task work and day work, and that the parties should give each other a general release; this award was held to be entirely void for the uncertainty of the sum to be paid for task work, which formed a consideration for the money to be paid on the other side. (*Pope v. Brett*, 2 Saund. 292.)

If there is any connection or inter-dependence between the good and the bad part they cannot be severed. When there is a good award standing alone, but in a subsequent part there is a reservation or delegation by the arbitrator of his authority, which runs over the whole award, this latter part vitiates the whole award. (*Storke v. De Smeth*, Willes, 69; *Pedley v. Goddard*, 7 T. R. 73.) Thus, where an arbitrator awarded that certain suits should cease, and awarded three several sums to be paid by A. to B. on three several days, and if before the last day of payment it should appear to the arbitrator that B. was engaged for A. in a debt not satisfied, then B. should repay to him so much as the debt not satisfied amounted to, and that the parties should execute mutual releases; the court held that this reservation of power affected the whole award and rendered it wholly void. (*Winch v. Saunders*, Cro. Jac. 584.)

An award will be void if the decision of matters beyond his authority has affected the arbitrator's decision as to matters within his authority. (*Re Marshall and Dresser*, 3 Q. B. 878; 12 L. J., Q. B. 104.) So, it is presumed if the attendant circumstances make it obvious that the arbitrator would have altered his finding in the good part had he known that the remainder would be inoperative.

CHAPTER XIII.

AWARDING ON AN ACTION.

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Action in-
cludes
counterclaim.Award should
show how and
what it de-
cides.

It must be borne in mind that the rules and observations hereinafter contained as to awarding on an action, apply equally to awarding on a counterclaim, which is in the nature of a cross action. And a reference of "all matters in difference in the action," includes a counterclaim. (*Weall v. James*, 68 L. T. 54.)

When an action is referred the pleadings need not be set out in the award. (*Johnson v. Latham*, 20 L. J., Q. B. 236.) It is not necessary that the arbitrator should find for the plaintiff or defendant in the words of the issue; it is sufficient if he decide substantially the question in dispute. (*Wykes v. Shipton*, 3 N. & M. 240.) On the other hand it is sufficient if he find in the words of the issue (and this is the best and most proper way); he need not find in express terms for the plaintiff or defendant. (*Allen v. Lowe*, 4 Q. B. 66; 12 L. J., Q. B. 115; *Stonchewer v. Farrer*, 6 Q. B. 730; 14 L. J., Q. B. 122.)

Unless the terms of the submission empower him to do so, an arbitrator may not dispose of an action without showing in whose favour it is decided. As a general rule, where an action in which there are several issues is referred at *nisi prius*, the arbitrator should, if requested, direct how each issue is to be determined. (*Woolfe v. Hooper*, 6 Scott, 281; 4 Bing. N. C. 449; *Williams v. Mouldsdale*, 7 M. & W. 134.) But an award on a suit in equity, that the suit should be dismissed, was held sufficient. (*Knight v. Burton*, 1 Salk. 75; *Pearse v. Pearse*, 9 B. & C. 484.)

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When an action and counterclaim, with or without other matters in difference, are referred (*Ellis v. De Silva*, 50 L. J., Q. B. 328; 6 Q. B. D. 521; *Laud v. Campbell*, 14 Q. B. D. 821; 54 L. J., Q. B. 281; *Ahrbecker v. Frost*, 17 Q. B. D. 606; 55 L. J., Q. B. 477), or an action without counterclaim, but in which there are several issues, or an action and other matters in difference (*Hawke v. Brear*, 14 Q. B. D. 841; 54 L. J., Q. B. 315), and the costs of the action are to abide the event, the arbitrator must find upon each issue, so as to enable the officer of the court to tax the costs for the party in whose favour each issue has been found. (*Goutard v. Carr*, 53 L. J., Q. B. 55; 13 Q. B. D. 598, n.; *Kilburn v. Kilburn*, 13 M. & W. 671; 2 D. & L. 33; *Brooks v. Parsons*, 13 L. J., Q. B. 50; 1 D. & L. 691; *Bourke v. Lloyd*, 10 M. & W. 550; *Doe d. Starling v. Hillen*, 2 Dow., N. S. 694; *Pearson v. Archbold*, 11 M. & W. 477; *Lewis v. Curlewis*, 1 B. C. Rep. 161; and see Chap. XIV.) And he should so find, though not expressly requested to do so by the parties (*England v. Davison*, 9 Dow. 1052), and, whether he has an award or only a certificate to make. (*Brooks v. Parsons*, *supra*.) And he may not order a *stet processus*, for then, as there is no decision in favour of either party, there is no legal event of the action on which the costs can be taxed. (*Hunt v. Hunt*, 5 Dow. 442; *Norris v. Daniel*, 10 Bing. 507.) But if he award on all the issues, and then direct a *stet processus*, the latter direction will be void as an excess of authority, but will not vitiate the award. (*Ward v. Hall*, 9 Dow. 610.) If, however, the parties agree among themselves that, to avoid finding upon each issue, the arbitrator may, if he think there was no ground of action against the defendant, award a verdict for the defendant on all the issues, such an award will be good. (*Waddle v. Downman*, 12 M. & W. 562.) And where a verdict is taken subject to a reference to an

When costs abide the event arbitrator must find on each issue.

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arbitrator who is to award on some specified matters only, he need not find on the issues, or do more than decide on the particular questions. (*Soudon v. Mills*, 30 L. J., Q. B. 175.)

Specific findings on the issues.

It is not always necessary for the arbitrator to find *specifically* upon each issue; if it can be clearly inferred from the award in which way each of the issues has been found it is sufficient. (*Humphrey v. Pearce*, 22 L. J., Ex. 120; 7 Ex. 696; *Wilcox v. Wilcox*, 4 Ex. 500; 19 L. J., Ex. 27; *Hobson v. Stewart*, 4 D. & L. 589; *Stoneheuer v. Farrer*, 6 Q. B. 730; *Phillips v. Higgins*, 20 L. J., Q. B. 357; *Williamson v. Locke*, 2 D. & L. 782; *Armitage v. Coates*, 4 Ex. 641; *Baker v. Cotterill*, 18 L. J., Q. B. 345; 7 D. & L. 20.) Though the older cases (see *Brooks v. Parsons*, 13 L. J., Q. B. 50; 1 D. & L. 691), lay down the rule that each issue must have been specifically decided, the recent decisions of the courts have established the more lax rule above stated. In *Humphrey v. Pearce* (*supra*), Martin, B., said: "The case of *Brooks v. Parsons* may now be considered as overruled by no less than three decisions; first there is *Wilcox v. Wilcox*, which recognizes and adopts the principle of the decision of Erle, J., in *Hobson v. Stewart*; and there is the case of *Phillips v. Higgins*, in which my brother Wightman expressed his opinion that when there is a reference of a cause only the award is good, notwithstanding there is no specific finding on each issue, if it appear by reasonable intentment that *all the issues* have been determined in favour of the plaintiff. I am glad that the cases have been so decided, for it is plain that when an arbitrator awards that a plaintiff is entitled to a certain sum the meaning is that he is so entitled upon *all* the issues joined in the cause."

Reference of action only—general finding, when sufficient.

A difficulty in applying the above rule, and of dispensing with specific findings, except in the most simple

cases, is created by the law of pleadings and costs under the Judicature Acts, as the word "event" is to be read distributively, and the costs apportioned according to the results of the different issues. (*Myers v. Defries*, 49 L. J., Q. B. 266; 5 Ex. D. 180; *Goutard v. Carr*, 53 L. J., Q. B. 55.)

Where to a declaration consisting of three indebitatus counts there were pleas of non assumpsit, tender, set-off, and payment, upon which issues were joined, the cause having been referred at *nisi prius*, the costs of the cause to abide the event of the award, the arbitrator found for the plaintiff on the first, third, and last issues, and for the defendant on the second issue; it was held that this was a sufficient finding, and that it was not necessary there should be a distinct finding on all the sub-issues raised by the plea of non assumpsit upon each separate count in the declaration. (*Adam v. Rowe*, 15 L. J., Q. B. 223; 3 D. & L. 331.) So, where an action in which the declaration contained three counts, to which the defendant had pleaded not guilty, and to each of the counts various special pleas which went to the whole cause of action, was referred with all matters in dispute, the costs of the action and of the reference and award to abide the event; the arbitrator awarded that the plaintiff had good cause of action in respect of the second count, and was entitled to recover a certain sum for damages on that count, but that he had no cause of action in respect of the first and third counts; the award was held good. (*Williamson v. Locke*, 2 D. & L. 782; but see *England v. Darison*, 9 Dow. 1052.) But where to a declaration containing a single count for board and lodging and upon several other claims the defendant pleaded never indebted and a set-off, and the cause was referred, the costs to abide the event of the award, the arbitrator certified that a verdict should be entered on the first issue for the plaintiffs.

CHAP. XIII. and on the second issue for the defendant; he afterwards stated that he considered the claim for board and lodging was the only one the plaintiff had made out: the court, on motion by the defendant, referred the matter back to the arbitrator to enable him, if he thought fit, to find separately as to the different items contained in the declaration. (*Gore v. Baker*, 4 E. & B. 470; 24 L. J., Q. B. 94.)

No general finding when reference includes matters outside action.

It will be noticed that the rule laid down in *Phillips v. Higgins* (20 L. J., Q. B. 357), that a general finding in favour of the plaintiff is sufficient, only applies where the reference is merely of matters in difference in an action, and the case would be otherwise where the reference is of the action and all matters in difference (*per Parke, B.*, in *Humphrey v. Pearce*, *supra*); or where there is an action and counterclaim; and all arbitrators would do wisely by finding on each issue. (*Per Denman, C.J.*, *Stonehewer v. Farrer*, 6 Q. B. 740.)

Awarding a general verdict.

Usually awarding a general verdict in favour of the plaintiff or defendant will be considered a finding of all the issues in his favour. (*Dresser v. Stansfield*, 14 M. & W. 822; *Cooper v. Langdon*, 9 M. & W. 60.) But in a case in the Common Pleas, in an action on the usual money counts, with pleas of never indebted, Statute of Limitations, payment, set-off, accord and satisfaction, an award that the defendant was not at the time of action indebted to the plaintiff, and directing a verdict in defendant's favour, was held insufficient. (*Holland v. Judd*, 3 C. B., N. S. 826.)

No finding on issues necessary where arbitrator is to tax costs;

On a reference of an action and all matters in difference, all costs to abide the event and to be taxed by the arbitrator, he need not decide the issues separately from the other matters in difference, or state the amount of the costs separately, but directing the one party to pay a specified sum is a sufficient decision of all matters. (*Bradley v. Phelps*, 6 Ex. 897; 21 L. J., Ex. 310.)

Where only the costs of the reference and award, and not the costs of the action, are to abide the event, it is not necessary for the arbitrator to find upon each issue unless requested to do so. (*Duckworth v. Harrison*, 7 Dow. 71; 4 M. & W. 432; *Rennie v. Mills*, 7 Scott, 276.)

Where an action is in respect of several distinct matters, and before defence the action is referred, the arbitrator is not bound to find upon each matter, notwithstanding the costs of the action abide the event, for before a defence is pleaded it is impossible to say what the issues will be; it is sufficient if he decide in whose favour the action is determined (*Bearup v. Peacock*, 2 D. & L. 850; 14 M. & W. 149; *Crawshaw v. York and North Midland Rail. Co.*, 21 L. J., Q. B. 274; and see *Nicholson v. Sykes*, 23 L. J., Ex. 193); but he would act wisely by deciding the matters separately as if they were in issue. An award made in two causes referred before plea that all further proceedings should cease and be no further prosecuted, and that the defendant should pay a specified sum in full of all demands in the said causes, was held a sufficient determination of both causes. (*Wynne v. Edwards*, 12 M. & W. 708; see *Eardley v. Steer*, 4 Dow. 423; 2 C. M. & R. 327; *Harding v. Forshaw*, 1 M. & W. 415.) So it was formerly held that there was no necessity to find upon issues on a reference of a cause unless it was clear that issues had been so joined as to be capable of being specifically disposed of; and that on a reference after plea and before issue joined a specific finding on the issues was not necessary. (*Smith v. Reece*, 6 D. & L. 520.)

An unauthorized direction that a verdict shall be entered for a specified sum for the plaintiff does not amount to a direction to the defendant to pay that sum, nor can the payment be enforced by attachment (*Donlan v. Brett*, 2 A. & E. 344; *Hawkyard v. Stocks*, 2 D. & L. 936); though an action would lie upon the

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or where costs of action do not abide the event;

or where issues has not been joined.

Unauthorized direction of verdict.

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Arbitrator
awarding
damages
should assess
them.

award, as the courts would treat it as an informal finding that the plaintiff was entitled to succeed in the action to that amount. (*Everest v. Ritchie*, 31 L. J., Ex. 350; 7 H. & N. 698; *Law v. Blackburrow*, 23 L. J., C. P. 28.)

An award in favour of either party upon a claim or counterclaim for a money demand, or for damages, should state the amount he is entitled to recover. Thus in a reference of a cause in which there were seven issues, the costs of the award and reference to abide the event, and the arbitrator found for the plaintiff on two issues, neither of which covered the whole cause of action, and for the plaintiff on the others, but omitted to award damages, the award was held bad. (*Wood v. Duncan*, 7 Dow. 91.) And where a verdict for 1,000*l.* was taken subject to a reference, and the arbitrator found for the plaintiff but assessed no damages, and the plaintiff entered up judgment for the 1,000*l.*, the court held that the plaintiff was entitled only to nominal damages. (*Brown v. Somerset and Dorset Rail. Co.*, 34 L. J., Ex. 152.) But where an action on a money bond and all matters in difference were referred, and the arbitrator directed a verdict to be entered for the plaintiff, it was held sufficient, though it did not state for what amount; for there was no evidence that any other matters than the penalty on the bond were in difference, and if the plaintiff recovered a verdict it must mean for the whole amount of the claim. (*Cayme v. Watts*, 3 D. & R. 224.) Where a verdict was taken for the plaintiff subject to a reference of the cause and all matters in difference, the arbitrator having power to vacate the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand of the defendant 90*l.* in respect of the causes of action, and that the defendant was entitled to set off 35*l.* in respect of matters mentioned in the plea of set-off; it was held that the award sufficiently ascertained the amount for which the verdict

was to be entered, as all that was necessary was to deduct one sum from the other. (*Platt v. Hall*, 2 M. & W. 391.) So an award in an action on a covenant, where there was only one breach, directing a verdict to be entered for the plaintiff on each of the two issues raised by the pleas, with separate damages on each, was held sufficient, as the verdict might be entered for the aggregate sum of the two separate amounts. (*Smith v. Festiniog Rail. Co.*, 4 Bing. N. C. 23; 6 Dow. 190.)

An arbitrator may not award damages if he finds on a plea which covers the whole cause of action and completely answers the plaintiff's claim, and if he does the finding as to damages will be rejected as mere surplusage. (*Warwick v. Cor*, 1 D. & L. 986; 12 M. & W. 774; *Savage v. Ashwin*, 4 M. & W. 530.) But if on a reference of an action, the costs to abide the event, the arbitrator finds for the defendant on a plea which covers the whole cause of action, it is no objection to the award that on other issues he finds for the plaintiff without damages; in fact he should so find. (*Ross v. Clifton*, 12 L. J., Q. B. 265; 2 Dow., N. S. 983.)

When a verdict is taken subject to a reference the arbitrator cannot (so far as relates to an action referred) award payment of a greater sum than the amount taken on the verdict; and if he do, no assumpsit by implication will arise to pay, even to the extent of the amount so taken. (*Bonner v. Charlton*, 5 East, 139.) But if an arbitrator award a greater sum than the amount of the verdict, and judgment is entered for the whole, and it appear that part of the sum is covered by a countervailing demand which never was a subject of dispute, so that only a balance less than the amount of the verdict is ultimately to be paid over, the court will reduce the judgment to the amount of the verdict and grant execution for the sum really due. (*Prentice v. Reed*, 1 Taunt. 151.)

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When arbitrator finds on a plea covering the cause of action no damages awarded.

Damages not to exceed amount taken.

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The court will not, after a verdict taken for the damages laid in the statement of claim, allow the claim to be amended so as to enlarge those damages, even upon affidavit that a greater debt can be proved before the arbitrator. (*Pearse v. Cameron*, 1 M. & S. 675.)

An arbitrator should not direct either of the parties to an action to pay a larger sum than is claimed in the pleadings or particulars. But the particulars are not necessarily before the arbitrator even where the action is referred at *nisi prius*; therefore, if it is intended to limit a demand to the amount claimed by the particulars, they should be brought before the arbitrator. (*Kenrick v. Phillips*, 7 M. & W. 415.)

Damages not limited when all matters in difference referred.

If an action and all matters in difference be referred the arbitrator will not of necessity be confined to the amount of damages for which the verdict is taken, and if he award a greater sum the plaintiff will have a remedy under the award but not under the verdict. (*Pearse v. Cameron*, *supra*.)

Awarding damages in the action and in the other matters separately.

The older cases lay down the rule that where a cause and all matters in difference are referred, and the arbitrator finds that the plaintiff is entitled to recover, he must award how much is due in respect of the cause and how much in respect of the matters in difference (*Lund v. Hudson*, 1 D. & L. 236; *Crosbie v. Holmes*, 15 L. J., Q. B. 125); but it is said they have gone to an extreme degree of strictness. (*Bradley v. Phelps*, 21 L. J., Ex. 310, *per Parke*, B.) It is, however, advisable to state in an award how much of the damages is for each, that it may be plainly seen that the arbitrator has not exceeded the assigned limits in respect of the former (*Taylor v. Shuttleworth*, 6 Bing. N. C. 277; *Taylor v. Marling*, 2 M. & G. 55); and it is necessary to do so to enable a verdict to be entered for the former (*Bonner v. Charlton*, 5 East, 139); or where the costs of the action abide the event.

When an action only, to which there is no set-off or counterclaim, is referred, the arbitrator has no authority to order the plaintiff to pay a sum of money (*Poguer v. Hatton*, 7 M. & W. 211); but if the submission is of an action and all matters in difference, the arbitrator ought to ascertain the amount of the defendant's claim, and, if it exceed the plaintiff's demand, to direct the plaintiff to pay the balance. (*Malouy v. Stockley*, 2 Dow., N. S. 122; 4 M. & G. 647; *Williams v. Mouldsdale*, 7 M. & W. 134.)

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Awarding plaintiff to pay a sum of money.

Where costs were in the discretion of the arbitrator, an award that certain actions should be discontinued, and that each party should pay his own costs, was considered sufficient, being in effect an award of a *stet processus*. (*Blanchard v. Lilly*, 9 East. 497.) But an arbitrator cannot in any case award a *stet processus* unless he has power over the costs. (*Hunt v. Hunt*, 5 Dow. 442; *Re Leeming*, 5 B. & Ad. 403.)

Awarding a *stet processus*.

On a reference of a cause and all matters in difference, with a power to the arbitrator to enter a nonsuit, and he directed that to be done, the court held that he ought to have finally determined the matters litigated between the parties; and this was not done by a nonsuit. (*Wild v. Holt*, 9 M. & W. 161.)

Nonsuit.

Before the Judicature Acts, on a reference of an action, the arbitrator had no power, unless expressly authorized to do so by the submission, to direct judgment to be entered up for either party, even though the submission empowered him to direct the entry of a verdict, and to determine what he should think fit to be done by either of the parties. (*Angus v. Redford*, 11 M. & W. 69; 2 Dow., N. S. 735; *Toby v. Lovibond*, 17 L. J., C. P. 201; 5 C. B. 770; *Linegar v. Pearce*, 9 Ex. 417.)

Directing judgment to be entered before the Judicature Acts.

Frequently on the reference of an action, whether at *nisi prius* or before trial, the arbitrator was empowered to direct the entry of a verdict. In such a case, if the

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arbitrator directed the entry of a verdict, the party in whose favour it was given could sign judgment without any further order of the court.

Since the
Judicature
Acts.

Under the Judicature Acts, before entry of any judgment after a verdict, a direction must be obtained from the court or a judge. To obviate this, usually, either an express power is given to the arbitrator to direct judgment to be entered, or the order provides that the party in whose favour the award is made shall be at liberty to sign final judgment.

When order
silent as to
judgment.

But, even if the order of reference is silent as to entry of judgment, the award is "equivalent to the verdict of a jury" (Arbitration Act, 1889, s. 15), and under Order XXXVI. rr. 50 and 55c, the arbitrator has the same power to direct that judgment be entered for any or either party as a judge of the High Court. And under Order XL. rr. 2, 6A, it is compulsory upon him to direct how such judgment shall be entered, and it shall be entered accordingly. If he omit to direct judgment in his award, he would appear to have power to do so subsequently; and apparently a judge in chambers could supply the omission. (*Macalpine v. Calder* [1893] 1 Q. B. 545; 62 L. J., Q. B. 607.) But this does not apply to a reference of the action and other matters in difference. (*Darlington, &c. Wagon Co. v. Harding* [1891] 1 Q. B. 245; 60 L. J., Q. B. 110.)

Under Order XL, rr. 6 and 6A, any party may move to set aside the judgment and to enter any other judgment.

CHAPTER XIV.

COSTS.

SECT. 1.—*Costs of the Reference.*

IN the case of a submission by consent out of court, unless a contrary intention is expressed therein, “the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.” (Arbitration Act, 1889, s. 2, sched. 1, cl. (i).)

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Where reference by consent out of court.

This applies to a submission made before the Act. (*Re Williams and Stepney* [1891] 2 Q. B. 257; 60 L. J., Q. B. 635.) It enables the arbitrators and umpire to settle finally the amount of costs to be paid to them, but for this purpose the amount must be stated in, and as part of, the award. (*Re Stephens and Liverpool, &c. Insurance Co.*, 36 Sol. Jour., 464.) If fixed in the award, and the charges are extravagant, possibly the award might be set aside for misconduct. (*Re Prebble and Robinson* [1892] 2 Q. B. 602; 67 L. T. 267.) If not fixed in the award, the arbitrator's charges are liable to taxation. (*Ib.*)

An order of reference may be made on such terms as to costs, as the authority making it thinks fit. (Arbitration Act, 1889, s. 20.)

Where by order of court.

Where the whole of an action is referred to an official or special referee, and no provision is made as to costs,

Order silent—action only referred.

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he has power to deal with the costs (Order XXXVI. r. 55*b*), and the same power is conferred on an arbitrator when the action simply is referred to him. (Order XXXVI. r. 55*c*.)

Order silent—
action and
other matters
referred.

An order of reference by consent not only of the action, but of other matters in difference, is not made under the Arbitration Act, but derives its validity from the consent of the parties. (*Darlington Wagon Co. v. Harding*, [1891] 1 Q. B. 245; 60 L. J., Q. B. 110.) In such a case, if the order of reference is silent as to costs, but prior to drawing up the order there was a “submission” within the meaning of section 27 of the Arbitration Act, 1889, in the shape of a consent to refer, signed by the parties, their solicitors, or counsel (*Aitken v. Batchelor*, 62 L. J., Q. B. 193), the arbitrator would appear to have the same power over costs as one acting under a reference by consent out of court. If there is no such “submission” the authority of the arbitrator would appear to be the same as before the Act, when the order of reference was silent as to costs.

Rule before
Arbitration
Act, 1889,
where order
silent as to
costs.

Before the Arbitration Act, 1889, where an action was referred, and the order of reference was silent as to costs, there was a distinction as to the power of the arbitrator with respect to the costs of the action and those of the reference. As to the former, the power of awarding costs was necessarily consequent on the authority conferred of determining the action (*Roe v. Doe*, 2 T. R. 664), for the reason that the costs in the action were matters in difference in the action, though not mentioned in the submission. (*Firth v. Robinson*, 1 B. & C. 277.) The reason why in references of actions the provision is sometimes inserted that the costs shall abide the event is, that the arbitrator may not have it in his power to withhold costs from the party who is in the right, but it is a restriction of a power which he would otherwise have of allowing costs at his election. (*Roe v. Doe*, *supra*.)

But, as to the costs of the reference and award, when the order was silent about them, the arbitrator had no power to adjudicate upon them, they being matters not submitted to him, as arising subsequent to the time of submission; but each party had to bear his own expenses of the reference and the half of the award. (*Taylor v. Gordon*, 9 Bing. 570; *Bullen v. King*, 36 L. T. 732; *Candler v. Fuller*, Willes, 62; *Grove v. Cox*, 1 Taunt. 165; *Bell v. Belson*, 2 Chitt. 157; *Bradley v. Tunstow*, 1 B. & P. 34.)

In practice, whether the reference is of the action alone or with other matters, it is usually provided that the costs of the reference shall be in the discretion of the arbitrator, and when an action is referred on "usual terms," this includes, amongst other things, discretion of the arbitrator over the costs of the reference. (*Morel v. Byrne*, 21 W. R. 673; 28 L. T. 627.) The reason why he should have discretion over the costs is, that otherwise there would be nothing to restrain an unprincipled plaintiff from continuing the sittings indefinitely. (*Ib.*, per Blackburn, J.)

If an action is referred, and the submission make provision for the "costs," either that they shall be in the discretion of the arbitrator or abide the event, and there is nothing to limit the generality of the term "costs," it will include costs of the reference and award as well as costs of the cause. (*Wood v. O'Kelly*, 9 East, 436; *Bullen v. King*, 36 L. T. 732.)

Sometimes by the terms of the submission the costs of the reference are to abide the event of the award, in which case the arbitrator has no power over them, but the party in whose favour the entire event of the award is, will be entitled to them by virtue of the reference. In such a case it is not necessary that the arbitrator should give any specific directions as to costs. It is sufficient, where an action only is referred, if he direct how the

"Usual terms" include discretion of arbitrator over costs of reference.

What included under term "costs."

Where costs abide the event.

Where action only referred.

CHAP. XIV.

issues ought to be found, and that is the proper course for him to pursue. (*Gore v. Baker*, 4 E. & B. 470; 24 L. J., Q. B. 94; *Hemsworth v. Brian*, 1 C. B. 131; 14 L. J., C. P. 134.) And if the necessary consequence of the finding is, that the action is determined in favour of one of the parties, such party will be entitled to the costs of the reference. (*Eardley v. Steer*, 2 C. M. & R. 327; *Humphrey v. Pearce*, 7 Ex. 696; 22 L. J., Ex. 120.) When an action is referred before issue joined, and the costs of the reference and of the award are to abide the event, this means the event of the award generally without relation to the issues. (*Kelcey v. Stupples*, 32 L. J., Ex. 6; 1 H. & C. 576.)

When an action and counterclaim are referred, and the award on the counterclaim exceeds the amount awarded in the action, the "event" is in favour of the defendant so far as concerns the cost of reference and award. (*Lund v. Campbell*, 14 Q. B. D. 821; 54 L. J., Q. B. 281.)

Where action
and other
differences
referred.

If not only an action but other matters in difference are referred, under a submission providing that costs shall abide the event, should the award be in favour of the same party as to both, he will be entitled to the costs of the action and also of the reference. Should the action be determined by the award in favour of one, and the matters in difference be given for the other, the former will be entitled to the costs of the action, and the latter to the costs of the reference as to the matters upon which he has succeeded. (*Hawke v. Brear*, 14 Q. B. D. 841; 54 L. J., Q. B. 315.) The former rule, in such a case, was that there were no costs of the reference on either side. (*Gribble v. Buchanan*, 18 C. B. 691; 26 L. J., C. P. 24.)

In a reference of accounts, including accounts for which an action is brought, the party in whose favour the balance is found is entitled to the costs which abide the event. (*Hemsworth v. Brian*, 1 C. B. 131; 14 L. J., C. P. 134.) Where a cause and all matters in difference

were referred by an order of *nisi prius*, which provided that the costs of the reference and award should abide the event of the award, and the arbitrator decided the cause in favour of the defendant, and with respect to the matters in difference awarded that the plaintiff had a valid claim against the defendant, and that the defendant had a valid claim against the plaintiff of larger amount, and directed the plaintiff to pay the difference to the defendant—the claims were unliquidated and could not have been set off against one another in an action: it was held that the event of the reference was wholly in the defendant's favour, and that he was therefore entitled to the costs of the reference and award. (*Dunhill v. Ford*, L. R., 3 C. P. 36; 37 L. J., C. P. 32.) Where the arbitrator awarded that on the doing of certain things on both sides the action should cease, the court held that the event of the award was that each party should pay his own costs. (*Yates v. Knight*, 2 Bing. N. C. 277.)

When the costs of the action only are to abide the event, and the costs of the reference are in the discretion of the arbitrator, the arbitrator may award as he pleases with respect to the latter, notwithstanding the provisions of the County Courts Act, 1888, may deprive the plaintiff of his costs of the action. (*Infra*, p. 221.)

Costs in discretion of arbitrator.

The expenses incurred by the parties of the whole inquiry before the arbitrator, whether in respect of matters in an action or matters out of it, are costs of the reference.

What are costs of the reference.

In a reference by consent out of court, the costs of negotiating and settling the terms of the submission are costs of the reference. (*Re Autothreptic Steam Boiler Co.*, 21 Q. B. D. 182; 57 L. J., Q. B. 488.) The costs of a special case stated by the arbitrator are *prima facie* costs of the reference (*Re Knight and Tabernacle Permanent Building Society* [1892] 2 Q. B. 613, 620; *Re Holliday and Corporation of Wakefield*, 20 Q. B. D. 699; 57 L. J., Q. B. 620), subject to any order of the court.

CHAP. XIV. (*Re Gonty and Manchester, &c. Rail. Co.* [1896] 2 Q. B. 439.) The costs of an accountant employed by the arbitrator, by consent of the parties, may also be allowed as costs of the reference. (*Hawkins v. Rigby*, 29 L. J., C. P. 228; 8 C. B., N. S. 271.)

When they
are costs in
the action.

Generally, where an action is referred the costs of the reference are not costs in the action, the latter only including costs up to the order of reference. (*Brown v. Nelson*, 13 M. & W. 397; 2 D. & L. 405; *Tregoning v. Attenborough*, 1 Dow. 225; 7 Bing. 733.) Thus, the costs of witnesses examined before the arbitrator, to prove the issues in an action, are costs of the reference, not costs in the action. (*Brown v. Nelson*, *supra*; *Fryer v. Sturt*, 24 L. J., C. P. 154.) But where a verdict is taken, subject to a reference of the action to an arbitrator, who is to certify for whom and for what amount the verdict shall be entered, and the costs are to abide the event, the costs of the reference are costs in the action, and follow the legal event of the verdict, for there is, in fact, no verdict until the award is made, and all proceedings until then are in fact steps in the action. (*Deere v. Kirkhouse*, 20 L. J., Q. B. 195; 1 L., M. & P. 783; *Goodall v. Ray*, 4 Dow. 1; *Brown v. Nelson*, *supra*.) So if a verdict be taken subject to a special case to be stated by a person named, who, in the event of the court deciding in favour of the plaintiff, is empowered to direct for what amount the verdict is to be entered, and to whom the action and all matters in difference, subject to the special case, are referred, all costs up to the judgment of the court on the special case are costs in the action. (*Edwards v. Great Western Rail. Co.*, 12 C. B. 419.) Where, at the trial of an action, a verdict was taken for the sum claimed, subject to a reference to an arbitrator to reduce the amount if he should think proper, and the arbitrator made a formal award directing the amount of the verdict to be reduced to 1s.; it was

held that the decision of the arbitrator, though in form an award, was in substance a certificate, and that the plaintiff was therefore entitled to costs of the reference as costs in the action. (*Sim v. Edwards*, 25 L. J., C. P. 175; 17 C. B. 527.)

Although the rule is, that, when a verdict is taken subject to a reference on the question of damages only, the costs of the reference are costs in the action, yet if it is expressly stipulated that the reference shall be on "usual terms," the costs of the reference will not be costs in the action, but will be in the discretion of the arbitrator. (*Morel v. Byrne*, 21 W. R. 673; 28 L. T. 627.)

Formerly, in a compulsory reference to a master, all costs incurred before the master were costs in the action. (*Moore v. Watson*, L. R., 2 C. P. 314; 36 L. J., C. P. 122; *Galatti v. Wakefield*, 4 Ex. D. 249; 48 L. J., Ex. 70.) A special referee, to whom an action is referred for trial, is in an analogous position, and the costs of the reference are costs in the action. (*Patten v. West of England Iron, &c. Co.* 1894, 2 Q. B. 159; 63 L. J., Q. B. 757.)

Compulsory
reference.

The costs of the award are the amount of the arbitrators' and umpire's charges. They are deemed part of the costs of the reference, and follow the same rules. (*Re Walker and Brown*, 9 Q. B. D. 434; 51 L. J., Q. B. 424.)

What are
costs of
award.

We have seen (*ante*, p. 211) that, under the Arbitration Act, 1889, in a reference by consent out of court, the arbitrator may fix the amount of his fee in the award. This is not generally done by legal arbitrators, and it is not an advisable course, in any arbitration, for the arbitrator to fix his own fee by the award. (*Re Coombs*, 4 Exch. 839; *Roberts v. Eberhardt*, 28 L. J., C. P. 74.) But if he does, the court will not set aside the award unless the amount is excessive (*Rose v. Redfern*, 10 W. R. 91); though in one case, where the arbitrator had named the amount of his own costs in the award, the court refused

CHAP. XIV. to enforce the award in a summary manner. (*Parkinson v. Smith*, 30 L. J., Q. B. 178; but see *Threlfall v. Fanshawe*, 19 L. J., Q. B. 334.) The proper way is to direct which party is to pay the costs of the award without naming any sum, then for the arbitrator to notify to the parties the amount of his charges, and refuse to give up the award until the amount is paid. (*Ante*, pp. 126, 157.)

Costs of a
second award.

Subject to the general power of the court over costs under section 20 of the Arbitration Act, 1889, where an award, being defective, is referred back by the court to the arbitrator, who hears fresh evidence and makes a second award, the arbitrator's charges are to be borne equally. (*Blair v. Jones*, 20 L. J., Ex. 295; 6 Exch. 701.) If the necessity for a second reference is occasioned by the default of one of the parties, then he will be required to pay the costs of the first reference. (*Gladwin v. Chilcote*, 9 Dow. 550.)

Should the submission contemplate the possibility of an original and supplementary award, and give the arbitrator discretionary power over the costs of the reference and award, and it is referred back to him to reconsider a prospective direction, and the order referring back is silent as to costs, the clause in the submission as to costs gives the arbitrator power over the costs of the second reference, for the second reference is a part, or rather a continuation, of the reference. (*Johnson v. Latham*, 20 L. J., Q. B. 236.)

Abortive
reference.

The costs of an abortive reference are not costs in the cause. (*Doe v. Morgan*, 4 M. & W. 171.)

SECT. 2.—*Costs of the Action.*

Where the
reference is
silent as to
costs.

We have seen (*ante*, p. 212) that where an action is referred, the arbitrator may order either party to pay the costs of the action, although no express authority is

given to him upon that subject by the order of reference (*Roe v. Doe*, 2 T. R. 644); and this, although not only the action but all matters in difference are referred. (*Whitehead v. Firth*, 12 East, 165; *Firth v. Robinson*, 1 B. & C. 277; *Lewis v. Harris*, 4 D. & R. 129.)

If, by the order, the costs of the action are to "abide the event," the arbitrator cannot exercise any discretion in the awarding of them, or even in fixing their amount. (*Kendrick v. Davies*, 5 Dow. 693.) And the arbitrator need not notice the costs when they are to abide the event. (*Jupp v. Grayson*, 1 C. M. & R. 523; *Spiry v. Webster*, 2 Dow. 46; *Ward v. Hall*, 9 Dow. 610.) If he give any directions as to the costs they will generally be rejected as surplusage, and the rest of the award held good; and where by an order of reference the costs of the cause were to abide the event, and the arbitrator decided the suit in favour of the defendant, and ordered the plaintiff on a certain day to pay him those costs, it was held that the award was good, as the defendant was not deprived of any right to recover costs at an earlier date. (*Cockburn v. Newton*, 9 Dow. 676.)

Where costs
abide the
event.

On a reference of an action and matters in difference, where "the costs of the action shall abide the event of the reference," the "event of the reference" must be taken to mean the event or result so far as the action is concerned. (*Reynolds v. Harris*, 28 L. J., C. P. 26; *Waring v. Pearman*, 32 W. R. 429; 50 L. T. 633; *Sterens v. Chapman*, L. R., 6 Ex. 213; 40 L. J., Ex. 123.)

Event of the
reference.

When costs are to follow the event, the word should be read distributively, as if it were "events" (*Ellis v. De Silva*, 50 L. J., Q. B. 328; 6 Q. B. D. 521), and the costs are apportioned according to the results of the issues (*Myers v. Defries*, 49 L. J., Ex. 266; 5 Ex. D. 180), in the same way as if the events had been arrived at by the trial of the action in the ordinary way. (*Goutard*

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v. *Carr*, 53 L. J., Q. B. 55; 13 Q. B. D. 598 n.; *Pearson v. Ripley*, 32 W. R. 463.) So that where the costs were to abide the event, upon the reference of an action in which the defendants denied all the allegations of the statement of claim, and, as an alternative defence, paid a sum of money into court in satisfaction of the plaintiffs' claim, which the plaintiffs did not accept, the arbitrator having found all the issues except one as to special damage in favour of the plaintiffs, and having also found that the money paid into court was enough to satisfy the plaintiffs' claim in respect of the subject-matter of the action, it was held that the defendants were entitled to the general costs of the action and of the issues found in their favour, but that the plaintiffs were entitled to the costs of the issues on which they had succeeded. (*Ib.*; *Lund v. Campbell*, 14 Q. B. D. 821; 54 L. J., Q. B. 281.) In *Waring v. Pearman* (32 W. R. 429), a claim and counter-claim were referred, costs of the cause to abide the event. The claim was on a building contract for 500*l.*; the defendant paid 278*l.* into court and counterclaimed 500*l.* for "negligent workmanship." The arbitrator found for the plaintiff for 285*l.*, *i.e.*, for 7*l.* plus the sum paid into court, and for the defendant to the amount of 18*l.* It was held that the event of the action was substantially in favour of the plaintiff, and he was entitled to the general costs of the action, and the respective parties were entitled to the costs of the issues upon which they respectively succeeded. Where there was a reference of an action for a debt and a counter-claim for debt, and the award found a balance of 97*l.* due to the defendant on the counterclaim, the "event" was held to be in favour of the defendant, who was entitled to the general costs of the action, though the plaintiff was entitled to the costs of the issues found in his favour. (*Lund v. Campbell*, 14 Q. B. D. 821; 54 L. J., Q. B. 281.)

Where the costs of the reference are "to abide the event" it means the event with its legal consequence, having regard to the operation of the 116th section of the County Courts Act, 1888 (51 & 52 Vict. c. 43).

By that Act it is provided, with respect to any action brought in the High Court which *could have been commenced in a county court*, that if the action is founded on contract, and the plaintiff recovers a less sum than 20*l.*, he shall not be entitled to any costs of the action, and if he shall recover a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; and if, the action being founded on tort, the plaintiff shall recover a sum less than 10*l.*, he shall not be entitled to any costs of the action; and if he shall recover a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in the county court; unless in any such action, whether on contract or tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court, or a judge thereof at chambers, shall by order allow costs.

In connection with the section is to be read R. S. C. Order LXV. r. 12, which provides that, "In actions founded on contract, in which the plaintiff recovers by judgment or otherwise a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court, unless the court or a judge otherwise orders."

This enables a judge at chambers, where an action of contract has been referred to arbitration, by an order by consent providing that the costs of the action shall abide the event of the award, and the sum awarded does not

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To what extent costs affected by County Courts Act.
51 & 52 Vict. c. 43, s. 116.

Actions on contract.

On tort.

Power of court notwithstanding to allow High Court costs.

CHAP. XIV. exceed 50*l.*, to order that the costs shall be taxed on the High Court scale. (*Hyde v. Beardsley*, 18 Q. B. D. 244; 56 L. J., Q. B. 81.)

Power of
arbitrator.

When the whole of an action is referred without any other matters, an arbitrator, subject to any directions in the order of reference, “may exercise the same discretion as to costs as the court or a judge could have exercised.” (Order XXXVI. rr. 55*b* and 55*c*.)

A plaintiff “recovers” within the meaning of the section, as well, when the action is determined by an arbitrator, as when it is determined by trial in the ordinary course. So that when an action is referred upon the terms that the costs shall abide the event, the plaintiff is only entitled to the same costs of the action as if the action had been determined by a verdict for the same amount as that found by the arbitrator. (*Cowell v. Amman Colliery Co.*, 34 L. J., Q. B. 161; 6 B. & S. 333; *Fergusson v. Davison*, 51 L. J., Q. B. 267; 8 Q. B. D. 470; *Smith v. Edge*, 33 L. J., Ex. 9; 2 H. & C. 659.) The rule equally applies when there has been a verdict by consent, subject to a reference (*Smith v. Edge*, *supra*), and when the reference is after issue but before trial. (*Cowell v. Amman Colliery Co.*, *supra*; *Fergusson v. Davison*, *supra*.)

Where an action of contract and a counterclaim were referred, costs of the action to abide the event, and by the award the plaintiffs were awarded less than 20*l.*, whilst the defendant was awarded 63*l.* on his counterclaim, it was held that the plaintiffs were not entitled to the costs of the issues on which they had succeeded. (*Ahrbecker v. Frost*, 17 Q. B. D. 606; 55 L. J., Q. B. 477.) Where an action and other matters in difference were referred, costs of the action to abide the award, and the arbitrator awarded 40*l.* in respect of matters in the action and 14*l.* in respect of matters outside it, it was held that, having recovered less than

50*l.* in the action, the plaintiff was only entitled to county court costs. (*Emmett v. Heyes*, 36 W. R. 237.)

If the plaintiff's claim is established for a sum sufficient to entitle him to superior court costs, but the defendant prove a set-off which reduces the balance to less than sufficient to entitle him to such costs, the plaintiff only "recovers" the balance within the meaning of the Act, and is not entitled to costs without a certificate. (*Ashcroft v. Foulkes*, 25 L. J., C. P. 202; 18 C. B. 261; *Beard v. Perry*, 31 L. J., Q. B. 180; 2 B. & S. 493.)

What "sum recovered" when claim reduced by set-off.

A counterclaim which is in the nature of a cross action is not upon the same footing as a set-off, and therefore where a claim and counterclaim are referred, costs of the action to abide the event, if the plaintiff establishes his claim for an amount sufficient to entitle him to superior court costs, although the balance for which he obtains an award may be reduced to less than that amount by the counterclaim, he is not deprived of his costs. (*Stooke v. Taylor*, 49 L. J., Q. B. 857; 5 Q. B. D. 579; *Cole v. Firth*, 4 Ex. D. 301; 40 L. T. 851; *Neale v. Clarke*, 4 Ex. D. 286; 41 L. T. 438; *Potter v. Chambers*, 48 L. J., C. P. 274; 4 C. P. D. 457.)

When by counterclaim.

The Act and rule do not apply to a defendant so as to deprive him of his costs when he recovers less than the minimum amount on his counterclaim. (*Blake v. Appleyard*, 47 L. J., Ex. 407; 3 Ex. D. 195; *Chatfield v. Sedgwick*, 4 C. P. D. 459; 27 W. R. 790; and see *Davidson v. Gray*, 40 L. T. 192; 5 Ex. D. 189 n.)

To determine whether an action is "founded on contract" or "founded on tort" the substance of the action on the face of the statement of claim and defence is to be looked at, not the mere form of the pleading. (*Bryant v. Herbert*, 3 C. P. D. 339; 47 L. J., C. P. 670.) Thus, detinue is an action founded on tort (*ib.*), while a claim against common carriers for goods damaged through

Action on contract or tort, how determined.

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their negligence while *in transitu* is founded on contract. (*Fleming v. Manchester, Sheffield, &c. Rail. Co.*, 4 Q. B. D. 81; 39 L. T. 555; and see *Baylis v. Lintott*, 42 L. J., C. P. 119; L. R., 8 C. P. 354.) But if the ground of action is a wrongful act by the carriers after the contract to carry and deliver has been put an end to, the action is in respect of a tort. (*Pontifex v. Midland Rail. Co.*, 3 Q. B. D. 23; 37 L. T. 403.)

County Courts
Act does not
affect costs of
reference.

When an action is referred by consent, "the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator," the County Courts Act, 1888, will not affect the arbitrator's right to award the costs of the reference, whatever damages he may give. (*Forshaw v. De Wette*, L. R., 6 Ex. 200; 40 L. J., Ex. 153; *Galatti v. Wakefield*, 48 L. J., Ex. 70; 4 Ex. D. 249.)

Costs of
several causes
abiding event
as to each.

Where several actions were referred, "the costs of the several actions and of all matters and things relating thereto to abide the event of the award," that was held to mean that the costs in each action were to abide the event as to that action. (*Jones v. Powell*, 6 Dow. 483.) But where an action at law and a suit in equity were referred, and the costs were to abide the event, it was held that the event meant the ultimate and general event, and not that the costs of each suit should abide the event as regarded the suit. (*Reeres v. Macgregor*, 9 A & E. 576; 1 P. & D. 372.)

When suc-
cessful party
entitled to
costs allowed
by particular
statutes.

Generally, as before remarked, a party is entitled under an award in his favour to the same costs as on a verdict and judgment to the same effect; but the award does not of itself entitle the party in whose favour it is made to costs allowed by particular statutes on verdict, nonsuit, or other specified modes of termination of the suit, unless the arbitrator has and exercises the power of ordering the suit to be terminated in that particular mode. (*Holder v. Raith*, 4 N. & M. 466.) Therefore it was held that a

defendant in replevin was not entitled to double costs under 11 Geo. 2, c. 19, s. 22, on an award in his favour, in pursuance of a reference before issue joined (*Garney v. Buller*, 1 B. & A. 670; *Barnard v. Moss*, 1 H. Bl. 107), and that the court could not award costs under 43 Geo. 3, c. 46, s. 3, to a defendant, where the plaintiff on a reference before issue joined had been awarded an amount less than that for which he had arrested the defendant. (*Holder v. Raith*, *supra*.)

When an arbitrator has power to give a certificate for costs, he must do so in his award, for his power of certifying, like his other powers, is at an end when his award is made. (*Bedwell v. Wood*, 46 L. J., Q. B. 725; 2 Q. B. D. 627; *Spain v. Cadell*, 8 M. & W. 129.) An arbitrator to whom an action is referred, with all the powers of a judge to certify that the action was proper to be tried by a special jury, cannot give such a certificate after he has published his award (*Geerres v. Gorton*, 15 M. & W. 186), though the court may remit the matter to the arbitrator, to enable him to certify. (*Harland v. Mayor of Newcastle*, L. R., 5 Q. B. 47; 39 L. J., Q. B. 67.) When a cause was referred by order of *nisi prius*, and by the order the costs of the cause were to abide the event of the award, and the costs of the special jury, which had been obtained on the motion of the defendant, and of the reference were to be in the discretion of the arbitrator, the court held that the arbitrator had only the power of allowing the costs of the special jury as costs in the cause if the party who moved for the same were to succeed; and, therefore, that after awarding a verdict for the plaintiff, he could not award that he should pay the costs of the special jury. (*Finlayson v. M'Leod*, 1 B. & A. 663.)

We have previously pointed out when costs of the reference are costs in the action. (*Ante*, p. 216.)

Where an order to stay proceedings in an action has been made under section 4 of the Arbitration Act, 1889,

Certificate for costs, how given.

Power of court to vary order under

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section 4,
Arbitration
Act, 1889, as
to costs.

on the ground that the parties had agreed to refer, the court or judge has power to vary such order as to costs of the action at any time, even after the award has been made. (*Bustros v. Lenders*, L. R., 6 C. P. 259; 40 L. J., C. P. 193.) The arbitrator has no power over such costs.



SECT. 3.—*Arbitrator's Power over Costs within the Submission.*

How the
arbitrator's
discretion may
be exercised.

When an arbitrator has a discretion to exercise upon the subject of costs, he may order either party to pay the costs, or each to pay a moiety, or the like. (*Cargey v. Aitcheson*, 2 B. & C. 170.) He may order the entire costs to be paid by the successful party. (*Re Fearon and Flinn*, L. R., 5 C. P. 34.) He may direct an infant party to the reference, or a person (not a party to the cause), made a party to the reference by consent, to pay the whole costs. (*Proudfoot v. Boyle*, 15 M. & W. 198.) An action for pulling down a wall was referred by an agreement, to which B., who had authorized defendant to pull down the wall, was a party, the agreement was, "Record withdrawn, cause and all matters in difference referred to Mr. T., with power to say what shall be done by the parties, on all usual terms. B. to be party to the reference." By the order of reference, which set out the agreement, the costs of the cause were to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded that the defendant should pay half plaintiff's costs of reference and award, and B. the other half, and that B. should pay defendant half defendant's costs of action and reference. It being objected that the arbitrator had no power to order B. to pay any part of the costs of the action, it was held that he had power, as it was in the nature of a

direction to B. to pay the defendant a sum of money, which the arbitrator assessed at half the costs in the action. (*Stockley v. Shopland*, 26 L. T. 586.)

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Where an award contained a direction for plaintiff to pay defendant's costs, but no direction was given about payment of plaintiff's costs, it was held to be sufficiently evident that the plaintiff was to pay his own costs. (*Rose v. Redfern*, 10 W. R. 91.) And it is sufficient, if the award direct by whom the costs are to be paid without saying they are to be paid to the opposite party. (*Baily v. Curling*, 20 L. J., Q. B. 235.) Where a reference was of matters in difference between three parties, and the award directed that the costs of the arbitration should be paid by them in equal proportions, without showing to whom or in what manner they should be paid, the court held that it sufficiently appeared that they were to be paid to the arbitrator. (*Re Young*, 22 L. J., C. P. 160; 13 C. B. 623.)

Formerly, in a reference at common law, the arbitrator had no power, unless specially authorized, to award any costs other than the common costs as between party and party. (*Marder v. Cox*, Cowp. 127; *Seckham v. Babb*, 8 Dow. 167; *Barker v. Tibson*, 2 W. Bl. 953; *Whitehead v. Firth*, 12 East, 165; *Eccles v. Blackburn*, 30 L. J., Ex. 358.) In Chancery, however, upon a reference of a suit leaving the costs both of the suit and the reference in the arbitrator's discretion, he had jurisdiction to give costs as between solicitor and client if he thought fit. (*Mordue v. Palmer*, 39 L. J., Ch. 746; 40 L. J., Ch. 8; L. R., 6 Ch. 22.) It is assumed that this rule now applies to every reference of an action in which the costs are in the arbitrator's discretion. (*Andrews v. Barnes*, 39 Ch. D. 133, 57 L. J., Ch. 694.)

Costs as between party and party.

As between solicitor and client.

We have seen that in a reference by consent out of court, the arbitrator may award costs as between solicitor and client. (*Ante*, p. 211.)

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When the amount of costs must be fixed in the award.

If the costs are in the discretion of the arbitrator, "who shall ascertain the same," he is bound to ascertain and determine the amount of them, or the award will be bad, for the master's taxation will not supply the omission. (*Morgan v. Smith*, 1 Dow., N. S. 617; 9 M. & W. 427; *Grenfell v. Edgcome*, 7 Q. B. 661.) Where an agreement of reference contained a stipulation that "the costs of the agreement and of the reference and award should be in the discretion of the arbitrator, and be defrayed as he should direct," and the arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs, it was held that the award was therefore bad. (*Richardson v. Worsley*, 19 L. J., Ex. 317; 5 Ex. 613.)

Awarding a gross sum for costs.

The arbitrator when empowered to award costs has a very wide discretion. If the submission make no provision for their being taxed he may award a gross sum for costs, and the court will not review his discretion, unless the amount is grossly excessive. (*Turner v. Rose*, 1 Ld. Ken. 393; *Rowcliffe v. Devon and Somerset Rail. Co.*, 21 W. R. 433.)

When costs may be left to be ascertained by taxation.

If the arbitrator have a discretion over the costs, but no obligation to ascertain the amount, and the reference is of an action in the High Court, or by an agreement in writing, he need not ascertain the costs, but may leave them to be taxed by the officer of the court; and upon an award of costs generally to either of the parties they may be so taxed, even without any express direction to that effect. (*Bhear v. Harradine*, 21 L. J., Ex. 127; 7 Ex. 269; *Holdsworth v. Wilson*, 32 L. J., Q. B. 289; 2 B. & S. 480; *Metropolitan District Rail. Co. v. Sharpe*, 50 L. J., Q. B. 14; 5 App. Cas. 425.) Where the reference is of an action in an inferior court, or by a verbal agreement, which has not the same effect as an order of court, the arbitrator must himself assess the costs. (*Winter v. Garlick*, 1 Salk. 75; *Thorp v. Cole*, 4

Dow. 457; *Addison v. Grey*, 2 Wils. 293.) This would not seem to apply to an action in the county court, in which there is a proper officer to tax costs. (See *Lewis v. Rossiter*, 44 L. J., Ex. 136; 23 W. R. 832.) Even in an action in the High Court, an arbitrator cannot award costs to be taxed by any person but the proper taxing officer of the court, for this would be a delegation of his authority; the taxation of costs by the master being a ministerial, and in any other person a judicial act. (*Knott v. Long*, 2 Stra. 1025.)

An award as to costs which is uncertain or not final is invalid to that extent. (*Re Smith and Wilson*, 18 L. J., Ex. 320; 2 Ex. 327; *Williams v. Wilson*, 23 L. J., Ex. 17; *Re Morris and Morris*, 25 L. J., Q. B. 261; 6 E. & B. 383.) And where an action in which there were several issues was referred, and amongst other things the arbitrators awarded that the costs of the several issues should be paid "to the plaintiff or to the party entitled thereto," the award, so far as related to the costs, was held void for uncertainty. (*Hetherington v. Robinson*, 8 L. J., Ex. 148; 4 M. & W. 608.)

Invalid directions as to costs.

When an arbitrator directs one party to pay the costs of the action, this will generally be understood to mean such costs only as the other party would be entitled to if a verdict and judgment had been obtained to the same effect as the award. (*Allenby v. Proudlock*, 5 N. & M. 636; *Rigby v. Okell*, 7 B. & C. 57.)

An error as to costs will not vitiate the whole award. (*Aitcheson v. Cargay*, 2 Bing. 199; 9 Moore, 381; *Roberts v. Eberhardt*, 28 L. J., C. P. 74.)

A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. (R. S. C. Order LXV. r. 14.) The contrary rule formerly prevailed, preventing an arbitrator awarding a set-off to prejudice the solicitor's lien. (1 Chitt. Arch.

Set-off for damages or costs.

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145, 13th ed.; *Cowell v. Betteley*, 10 Bing. 432; *Hamer v. Giles*, 48 L. J., Ch. 508; 11 Ch. D. 942; but see *Pringle v. Gloag*, 48 L. J., Ch. 381; 10 Ch. D. 676.) The rule, however, leaves the court a discretion to refuse or allow the set-off to the prejudice of the solicitor's lien. (*Edwards v. Hope*, 14 Q. B. D. 922; 54 L. J., Q. B. 379.)

Mode of ascertaining the respective proportions when costs to be paid by the several parties.

If the arbitrator direct that the costs of the reference shall be paid by each party in specified proportions, the mode of ascertaining what sum each is to pay is by adding together the costs of both, and apportioning to each the proportionate part to which he is liable. Thus, if each is to pay a moiety of the costs of the reference, the costs of both will be brought as it were into hotch-pot and half paid by each party. (*Day v. Norris*, 1 Dow., N. S. 353.)

The payment of costs is enforced in the same manner as any other part of the award.

Costs under L. C. C. Act, 1845.

In a reference under the L. C. C. Act, 1845, all the costs of and incident to the arbitration are to be borne by the promoters, unless the arbitrators award the same or a less sum than shall have been offered by the promoters [in respect of the same subject-matter (*Miles v. Great Western Rail. Co.* [1896] 2 Q. B. 432), before the arbitrators on both sides have been appointed (*Re Gray and North Eastern Rail. Co.*, 45 L. J., Q. B. 818; 1 Q. B. D. 696), and not withdrawn (*Foster v. Sheffield Corporation*, 72 L. T. 549)]; in which case each party is to bear his own costs incident to the arbitration, and the costs of the arbitrators are to be borne by the parties in equal proportions. (Sect. 34.) The costs become payable within a reasonable time after the award has been made, and the execution of the conveyance is not a condition precedent to the right to recover them. (*Capell v. Great Western Rail. Co.*, 52 L. J., Q. B. 345; 11 Q. B. D. 345.)

By the Lands Clauses (Taxation of Costs) Act, 1895,

the costs of and incident to the arbitration and award shall, if either party so requires, be taxed by one of the masters of the Supreme Court. (58 & 59 Vict. c. 11, s. 1.) The assessment by a master is not a condition precedent to the claimant's right to bring an action for such costs, where the right to costs is disputed. (*Metropolitan District Rail. Co. v. Sharpe*, 50 L. J., Q. B. 14; 5 App. Cas. 425.) The master's taxation is not subject to review by the court. (*Re Sandbach Charity Trustees*, 47 L. J., Q. B. 10; 3 Q. B. D. 1.) This Act is not retrospective (*Doulton v. Metropolitan Board of Works*, L. R., 5 Q. B. 333; 39 L. J., Q. B. 165), and applies only to a reference purely within the L. C. C. Act, and not where the reference embraces other matters. (*Ib.*) The parties may contract themselves out of the Act, and agree to have the costs ascertained in some other manner than by the master's taxation. (*Wombwell v. Corporation of Barusley*, 36 L. T. 709.)

Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the costs of and consequent upon the reference are in the discretion of the arbitrator. (Section 180, sub-section 13.) If he neglect to deal with them, the award will be remitted to him for that purpose. (*Peake v. Finchley Local Board*, 57 L. T. 882.) This does not apply to a reference as to the assessment of compensation in respect of lands taken by a local board under the L. C. C. Act, over which the arbitrator has no discretion. (*Ex parte Rayner*, 47 L. J., Q. B. 661; 3 Q. B. D. 446.)

Costs under
Public Health
Act, 1875.

The costs allowed under both Acts are party and party costs, and not as between solicitor and client. (*Re Cowdell*, 31 W. R. 335; 52 L. J., Ch. 246.)

Under the Railways Clauses Act, 1845, the costs are left to the discretion of the arbitrator; and so, subject to the agreement of the companies, are the costs of an arbitration under the Railway Companies Arbitration Act, 1859.

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Costs of reference at quarter sessions.

When an order of reference in an appeal at quarter sessions is silent as to costs, the arbitrator has no power over the costs of the appeal (*West London Rail. Co. v. Fulham Union*, 39 L. J., Q. B. 178 ; L. R., 5 Q. B. 361); nor can any subsequent court of quarter sessions order them, though the appeal may have been regularly adjourned from session to session (*R. v. JJ. Middlesex*, L. R., 6 Q. B. 220 ; 40 L. J., M. C. 109) ; nor, in a like case, can the court of quarter sessions itself order the payment of the costs of the reference. (*R. v. JJ. West Riding*, 34 L. J., M. C. 142 ; 13 W. R. 738.)

If the order of reference give the arbitrator power over the costs, and he deals with them in his award, the taxation may take place after the sessions at which the award is entered as the judgment of the court, are over, if such be the usual practice, and no objection to that course is raised at the time. (*Southampton Gas Light Co. v. Southampton Union*, 46 L. J., M. C. 238 ; L. R., 2 Q. B. D. 371.)

SECT. 4.—*Taxation of Costs.*

When costs may be taxed.

We have seen in what cases costs may be taxed by the officer of the court, namely, where there is a submission within the meaning of the Arbitration Act, 1889, or a reference by order of court, and the arbitrator has not awarded a gross sum for costs, but costs generally, with or without any express direction as to their being taxed.

May be taxed though time for setting aside the award has not elapsed.

Formerly, the party in whose favour the award was made, was not entitled to have his costs taxed until the time had expired within which it was open to the unsuccessful party to move to set it aside. (*Hobdell v. Miller*, 2 Scott, N. R. 163.) But now, "costs may be taxed on an award notwithstanding the time for setting aside

the award has not elapsed." (R. S. C. Order LXV. CHAP. XIV. r. 15.)

The usual one day's notice of taxation, together with a copy of the bill of costs, must be given. (R. S. C. Order LXV. r. 16.)

The costs will be taxed as between party and party unless the arbitrator, having authority to do so (*ante*, p. 227), order otherwise.

When an action is referred, and the plaintiff recovers a less sum than sufficient to entitle him to costs under section 116 of the County Courts Act, 1888, or only sufficient to entitle him to costs according to the county court scale under R. S. C. Order LXV. r. 12, his right to costs will depend upon the certificate given by the arbitrator. (*Smith v. Hailey*, 42 L. J., Ex. 5; L. R., 8 Ex. 16.) The plaintiff's solicitor should therefore, by way of precaution, take care that the submission, or order of reference, express that the arbitrator shall have power to certify as a judge might. (*Wallen v. Smith*, 5 M. & W. 159; *Lund v. Hudson*, 1 D. & L. 236; *Elleman v. Williams*, 2 D. & L. 46; *Astley v. Joy*, 9 A. & E. 702.)

The costs of the reference, when they are not to be treated as costs in the cause, are taxed without reference to the amount awarded. (*Holland v. Vincent*, 23 L. J., Ex. 78; 9 Ex. 274; *Nicholson v. Sykes*, 9 Ex. 357.)

The master must tax the costs according to the language of the award. And the court will sometimes, when there is a difficulty in construing the legal effect of an award, direct the master how the costs are to be taxed. (*Reynolds v. Harris*, 28 L. J., C. P. 26; 3 C. B., N. S. 267.)

The same allowance is made for witnesses attending before an arbitrator as upon the trial of a cause at *nisi prius*. (Dax, Pr. 250.) Where a witness is rejected before the arbitrator, his costs will not be allowed on taxation. (*Galloway v. Keyworth*, 15 C. B. 228; 23 L. J., C. P. 218.)

Costs of witnesses.

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Fees to
counsel.

The costs of the attendance of counsel will be allowed where it is proper counsel should attend. It is the general practice of the court not to allow the costs of more than one counsel attending the arbitrator on each side, in an ordinary reference (*Hawkins v. Rigby*, 29 L. J., C. P. 228; 8 C. B., N. S. 271); but there is no inflexible rule, and if the case be of great importance or difficulty, and two counsel attend, their fees will be allowed. (*Sinclair v. Great Eastern Rail. Co.*, 39 L. J., C. P. 165; L. R., 5 C. P. 135; *Orient Steam Co. v. Ocean Marine Co.*, 35 W. R. 771.) But the costs of shorthand writers' notes for the use of counsel will not be allowed, although it may be a case in which a second counsel would be allowed for. (*Croomes v. Gore*, 1 H. & N. 14; 25 L. J., Ex. 267; *Wells v. Mitcham Gas Co.*, 48 L. J., Ex. 75; 4 Ex. D. 1.)

Costs of quali-
fying a wit-
ness to give
evidence.

Formerly, the practice of the common law courts was to disallow the expenses of qualifying a witness to give evidence, while in the Chancery courts such expenses were allowed. The latter practice now obtains in both divisions of the High Court. By Order LXV. r. 27, sub-rule 9, of R. S. C. 1883, in taxing costs, "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence," are to be allowed. This would include the fees of surveyors, for time employed in examining and surveying premises to enable them to give evidence at the trial (*Mackley v. Chillingworth*, 46 L. J., C. P. 484; 2 C. P. D. 273); and of scientific witnesses getting up the case. (*Smith v. Buller*, 45 L. J., Ch. 69; L. R., 19 Eq. 473.) It would also include the costs of an accountant employed to investigate accounts, such as were disallowed in *Nolan v. Copeman* (42 L. J., Q. B. 44; L. R., 8 Q. B. 84); and the fees of an antiquary, for searching after and translating ancient records. (*Beaufort v. Ashburnham*, 32 L. J., C. P. 97; 13 C. B., N. S. 598.)

As between the parties, the arbitrator's charges may be reviewed on taxation. (*Barnes v. Hayward*, 1 H. & N. 742.) But it is not usual for the master to question the arbitrator's charges, but to pass them without inquiry, especially if he be a barrister. (*Smith v. Troup*, 7 C. B. 757.) In taxation there is no different scale whether the arbitrator be a Queen's counsel or a junior; but in all cases, it is in the discretion of the master to allow such remuneration as the difficulty and nature of the arbitration may, in his opinion, justify. (*Sinclair v. Great Eastern Rail. Co.*, 39 L. J., C. P. 165.) It is only usual to allow ten guineas in the case of a Queen's counsel, and no larger sum will be allowed in the case of an eminent engineer. (*Re Westwood*, 81 L. T., Jour. 84; 2 Times L. R. 667.) A lay arbitrator may employ a professional person to draw his award. But where a separate charge was made for a solicitor's costs of preparing the award, the arbitrator having charged a sufficient sum for the award, it was held that the master was right in disallowing the amount of the solicitor's bill in the costs. (*Galloway v. Keyworth*, 23 L. J., C. P. 218; 15 C. B. 228.) It is provided by section 15 (3) of the Arbitration Act, 1889, that the remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the court or a judge shall be determined by the court or a judge. This is of little practical importance, and is seldom applied.

If the arbitrator award the defendant to pay the plaintiff his costs of action, to be taxed by the proper officer before a particular day, it is the *defendant's* business to have them taxed before that day (*Candler v. Fuller*, Willes, 62); and if he do not, the plaintiff may proceed to have them taxed *ex parte*. (*Sadler v. Robins*, 1 Camp. 253.)

If a verdict has been taken at *nisi prius*, and one party is entitled to the costs of the cause and also to the costs

CHAP. XIV. of the reference, such costs should be taxed separately, if it is intended to sign judgment for the costs of the action. When the arbitrator directs that the costs of the cause shall be taxed by the proper officer, they should be taxed as upon a verdict to the like effect as the award. (*Allenby v. Proudlock*, 5 N. & M. 636.)

CHAPTER XV.

REFERRING BACK AN AWARD.

AFTER an award is made and published the arbitrator, as we have seen (*ante*, p. 157), has very limited power to alter it. CHAP. XV.

But, section 10 of the Arbitration Act, 1889, provides that "in all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." (52 & 53 Vict. c. 49.) Power of
court to remit
the award.

Although section 10 is one which applies only to references by consent out of court, its provisions are by section 16 of the Act made applicable to references under order of court. And Order XXXVI. r. 52, further contains power of remitting, where a case is referred for trial.

The object of these provisions was, when any error, formal or otherwise, had occurred which would vitiate the award, to enable the court to send it back, if they thought fit, to the arbitrator to correct such error instead of setting the award wholly aside. (*Mills v. Bowyer's Society*, 3 K. & J. 66.) And the general power to remit back thereby given, is not restrained by a clause in the submission, only empowering the court to refer back the award in case of a motion being made to set it aside. (*Re Morris and Morris*, 6 E. & B. 383; 25 L. J., Q. B. 261.)

An award under the L. C. C. Act, 1845, is within the section, and may be referred back. (*Dare Valley Rail. Co. v. Rhys*, 38 L. J., Ch. 417; L. R., 4 Ch. 554.) So may an award in a reference under the Public Health Act, 1875. (*Warburton v. Haslingden Local Board*, 48 L. J., C. P. 451.)

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Mode of application.

The application to remit, which is generally supported by an affidavit of the facts upon which it is founded, may, under section 10 of the Act, be made to the "court or a judge," which means it may be made to a master in chambers. (Order LIV. r. 12*a*.) The application will be by summons instead of by motion, as contemplated by Order LII. rr. 1—3. An application to remit under Order XXXVI. r. 52 (and see r. 55*c*), is to the court, and by motion. The summons or motion must be served on the parties affected thereby (R. S. C. Order LII. rr. 1—3), but not upon the arbitrators. (*Moseley v. Simpson*, 42 L. J., Ch. 739; L. R., 16 Eq. 226.)

When by motion, the notice shall state in general terms the grounds of the application, and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion. (Order LII. r. 4; *Mercier v. Pepperell*, 19 Ch. D. 58; 51 L. J., Ch. 63.)

Unless by special leave there must be two clear days between the service of a summons or notice of motion and the day named for hearing the application. (Order LII. r. 5.)

Form of notice.

If by motion, the notice may be in the alternative to set aside or remit the award. And upon a motion simply to set aside the award, the court could exercise its power of remitting the award to cure the defect upon which the motion to set aside is grounded. (*Anning v. Hartley*, 27 L. J., Ex. 145; *Peterson v. Ayre*, 23 L. J., C. P. 129.)

Even on an application to enforce the award the court, in the event of the application being opposed upon the ground of some manifest defect in the award, may order it to be remitted to the arbitrator instead of dismissing the application.

Within what time application to remit

There is no absolute limit of time within which the application must be made (*Warburton v. Haslingden*

Local Board, 48 L. J., C. P. 451; *Leicester v. Grazebrook*, 40 L. T. 883), but the application must be within a reasonable time (*Leicester v. Grazebrook*, *supra*), and should generally be made within the same time as an application to set it aside (*Doe v. Holmes*, 12 Q. B. 951); for the court will not refer matters back where there has been a long delay since the last step was taken upon the award, and such delay is not satisfactorily explained, because the position of the parties may be altered, and they may be unable to produce their witnesses. (*Doe v. Cannell*, 17 Jur. 347; 22 L. J., Q. B. 321.) Where the application to remit was made more than a year after the award was made, the court refused the application, as it could not then be granted without great inconvenience (*Warburton v. Haslingden Local Board*, *supra*); but where the necessity to remit arose from a mere clerical blunder in the award, the court remitted it eighteen months after it was made. (*Mordue v. Palmer*, 40 L. J., Ch. 8; L. R., 6 Ch. 22.)

It has been held that the statutory power of remitting back only applies to such cases as might have been remitted before the Act if the submission had contained a clause to that effect. (*Hodgkinson v. Fernie*, 27 L. J., C. P. 66; 3 C. B., N. S. 189.) So, it has been held, that the court has only power to refer back in cases in which they would have power to set aside an award. (*Hogg v. Burgess*, 27 L. J., Ex. 318; 3 H. & N. 293.) But this rule has not been always followed, and a broader equity now obtains, so that, the stern rule that the parties having chosen their own tribunal must abide by its decision without appeal, though strictly applicable, where an attempt is made to set aside an award, which is a serious matter, rendering all former proceedings void, is to be less strictly applied where an obvious injustice may be avoided by sending the award back for reconsideration, at a trifling

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should be made.

In what cases an award will be remitted.

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expense and without any serious consequences to either party. The following rules seem deducible from the authorities.

When
grounds for
setting it
aside exist.

Generally, any defect in an award sufficient to empower the courts to set it aside (*post*, Chap. XVII.) will give them power to remit it instead of setting it aside.

Patent defect.

An award may be remitted to correct a patent defect, *e.g.*, where it is defective on its face in the mode of awarding costs (*Re Morris and Morris*, 25 L. J., Q. B. 261; 6 E. & B. 383; *Re Fearon and Flinn*, L. R., 5 C. P. 34); or where it does not find the issue specifically, and the costs abide the event. (*Ellis v. De Silva*, 50 L. J., Q. B. 328; 6 Q. B. D. 521; *Gore v. Baker*, 24 L. J., Q. B. 94.)

Award not
final.

An award may be remitted on the ground that it is not final, by reason of the arbitrator having refused or omitted to decide upon some matter submitted to him (*Insull v. Moojen*, 27 L. J., C. P. 75; 3 C. B., N. S. 359); but an application upon this ground must be supported by affidavits showing that the matter was brought before the arbitrator. (*Erskine v. Wallace*, 12 W. R. 134.)

Exceeding
submission.

An award may be referred back where the arbitrator has exceeded the submission (*Re Dare Valley Rail. Co.*, L. R., 6 Eq. 429; *Re Green and Balfour*, 63 L. T. 97, 325; *Hooper v. Balfour*, 62 L. T. 646), but it must be clear that he has exceeded his authority. (*Re M'Lean and Marcus*, 6 Times L. R. 355; *Re Brandt and Boucher*, 7 Times L. R. 140.)

Omission
through inad-
vertence.

If an arbitrator has awarded to the plaintiff a less sum than is sufficient to entitle him to costs, and has, through inadvertence, omitted to certify that the action was fit to be tried before a judge of the High Court, the matter may be referred back for amendment at the expense of the party who seeks to send it back (*Cross v. Cross*, 13 C. B., N. S. 253; *Caswell v. Groucutt*, 31 L. J., Ex. 361); and where, after a considerable lapse

of time, the plaintiff obtained *ex parte* from the arbitrator a document, in which he stated that it appeared to him at the reference that there was sufficient reason for bringing the action in the Court of Queen's Bench, the court treated the matter as one not properly awarded upon by the arbitrator, and remitted the award to him in order that he might fully exercise his powers. (*Harland v. Mayor of Newcastle*, 39 L. J., Q. B. 67; L. R., 5 Q. B. 47.)

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If an award does not comply with the formalities required by the submission, it may be remitted for the purpose of curing the formal defect. Thus, the court will remit back an award to be re-executed, when joint arbitrators have not all executed it together. So, when any similar error has occurred, involving no misconduct in the arbitrators or substantial injustice to the parties, it will be sent back to be corrected. (*Anning v. Hurlley*, 27 L. J., Ex. 145.)

Formal defect

Formerly, an award would be remitted to correct a clerical error. Thus, where an engrossment executed by the arbitrator omitted some words which were in the draft of his intended award the court remitted it to cure the mistake. (*Mordue v. Palmer*, 40 L. J., Ch. 8; L. R., 6 Ch. 22.) So, where the award referred to the defendant by a wrong christian name. (*Davies v. Pratt*, 25 L. J., C. P. 71; 16 C. B. 586.) This is no longer necessary, for in a reference by consent out of court, an arbitrator or umpire may correct a clerical mistake or error from any accidental slip or omission. (Arbitration Act, 1889, s. 7 (c).)

Clerical error
in the award,

or accidental
slip or omis-
sion.

When an award is good on the face of it, but the finding of the arbitrator is based upon a mistake, this will sometimes be ground for applying to refer it back to him, though the decisions upon the point are somewhat conflicting.

Mistake of
arbitrator.

It is no ground for sending back an award, good on the face of it, that the arbitrator has made a mistake in law,

Mistake in
law.

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or has misapprehended the legal effect of his decision. Thus, where arbitrators, believing they had power over costs, awarded the plaintiff a greater sum than they would have done if they had thought the costs followed the event, the application to remit was refused, notwithstanding the arbitrators made an affidavit admitting the mistake. (*Allen v. Greenslade*, 33 L. T. 567.) A like application was refused, though an arbitrator swore that he intended that the effect of his award should be to give the defendant the costs of his counterclaim. (*Greenwood v. Brownhill*, 44 L. T. 47.) The earlier case of *Dinn v. Blake* (44 L. J., C. P. 276; L. R., 10 C. P. 388; 32 L. T. 489), which does not appear to have been cited in either of these cases, is an authority for referring back the award where the arbitrator is dissatisfied with his decision, as given under a misapprehension of law. (And see *Grafham v. Turnbull*, 44 L. J., Ch. 538.)

Mistake such that the award is not the decision of the arbitrator.

Though the courts will not interfere with the arbitrator's judgment either on fact or law, yet when there has been, not an error of judgment, but a mistake of the arbitrator, the effect of which has been that his mind has not been exercised upon the real case submitted to him, and therefore that he has not adjudicated upon the actual controversy, the courts will remit it as being no decision. (*Flynn v. Robertson*, 38 L. J., C. P. 241; L. R., 4 C. P. 324.) Thus, an action having been referred to the master, and it being admitted at the reference that something was due to the plaintiff, the master certified that nothing was due; it was admitted on all hands, and the arbitrator stated that he had made a mistake, but the defendant objected to the award going back; the court, however, held that it had power, and ought to refer the matter back. (*Ib.*; and see *Mills v. Bouryer's Society*, 3 K. & J. 66.) So, if by mistake, the arbitrator write one sum for another in his award, or, meaning to add two sums together, by mistake deduct the smaller

from the greater, the writing is not his award, as it does not express his intention (*Brown v. Hellaby*, 26 L. J., Ex. 217, *per* Bramwell, B.; *Re Hall and Hinds*, 2 M. & G. 847; 10 L. J., C. P. 210, *per* Tindal, C.J.), and may be remitted to him for correction. CHAP. XV.

An award will not be sent back to the arbitrator for an alleged mistake not manifest upon the face of it, unless the arbitrator admit that he has made a mistake, and is himself desirous of the assistance of the court to set it right. (*Dinn v. Blake*, 44 L. J., C. P. 276; L. R., 10 C. P. 388; *Walton v. Swanage Pier Co.*, 10 W. R. 629; *Lockwood v. Smith*, *ib.* 628; *Imperial Royal Chartered Azienda v. Funder*, 21 W. R. 67.) Therefore, if an award is good on the face of it, the court will not refer it back for an alleged mistake in law, attempted to be made out on affidavits (*Fuller v. Fenwick*, 16 L. J., C. P. 79; *Baguley v. Markwick*, 30 L. J., C. P. 342), or remit to him to state a case when, at the hearing, he has declined to do so. (*Holloway v. Francis*, 9 C. B., N. S. 559; *Gibbon v. Parker*, 5 L. T., N. S. 584.) An agreement of reference in an appeal against a poor rate contained a clause enabling the arbitrators, at the request of either party, to state a case to be settled by the umpire for the opinion of the court; the arbitrators having disagreed, the umpire made his umpirage, and subsequently, at the request of the appellants, set out the principles of law on which he had acted; the court refused to refer back the matter to enable the umpire to state the case more fully, as the appellants had had the opportunity of getting a case stated, and instead of doing so had taken their chance of getting the umpirage made in their favour. (*Re London Dock Co. and Trustees of Shadwell*, 32 L. J., Q. B. 30.)

The question has from time to time arisen, whether a paper accompanying the award can be looked at by the court, so as to disclose a mistake of the arbitrator, and

Mistake must be a limited by arbitrator.

Paper accompanying award, when court will look at.

CHAP. XV.

form ground for an application to set aside or remit the award, it being otherwise unimpeachable. The result of the authorities seems to be, that where the paper is intended and professes to be part of the arbitrator's decision, the court will look at it, not otherwise. (*Leggo v. Young*, 24 L. J., C. P. 200 ; 16 C. B. 626.) Thus, a paper delivered by an arbitrator to one of the parties, along with the award, in which the arbitrator stated that he would have given that party the costs if he had had the power, was a matter which the court refused to notice on an application to send back the award on the question of costs. (*Ib.*) In *Hogg v. Burgess* (27 L. J., Ex. 318 ; 3 H. & N. 293), Watson, B., stated the rule thus : "Where, either upon the face of the award or by a paper contemporaneous with it, the arbitrator professes to found his award upon a question of law, and determines it wrongly, the court may interfere." But, according to Williams, J., in *Hodgkinson v. Fernie* (27 L. J., C. P. 66 ; 3 C. B., N. S. 189), the paper must be "accompanying and forming part of the award." This qualification has been often approved. (*Holgate v. Killick*, 31 L. J., Ex. 7 ; 7 H. & N. 418 ; *Re London Dock Co. and Trustees of Shadwell*, 32 L. J., Q. B. 30 ; *Dinn v. Blake*, L. R., 10 C. P. 388 ; 32 L. T. 489.)

Discovery of
new evidence.

Though the discovery of new evidence would probably not induce the court to set aside an award, it would be ground for an application to refer back the award. Thus, where one party against whom an award was made applied to have it sent back, on the ground that he had since found a letter in the other party's handwriting containing material evidence in his favour, and which the arbitrator stated would have materially affected his decision, if it had been given in evidence before him : the court remitted the case to the arbitrator, though the other party swore that the latter was a forgery. (*Burnard v. Wainwright*, 19 L. J., Q. B. 423 ; *Re*

Keighley and Bryan [1893] 1 Q. B. 405; 62 L. J., (Q. B. 105.) CHAP. XV.

When a letter book, containing copies of letters which had been adduced in evidence before an arbitrator and marked by him as read was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced, and he referred to a copy of a letter contained in the book which had not been marked as adduced in evidence, the court ordered that the case should be referred back, in order that the party against whom the letter was used might have an opportunity of explaining its contents, but refused to set aside the award. (*Davenport v. Vickery*, 9 W. R. 701.)

As a general rule the award will be referred back to the same arbitrators, when a mere formal error has occurred involving no misconduct in the arbitrators or substantial injustice to the parties, and there is no reason to suppose that they may not be trusted. (*Anning v. Hartley*, 27 L. J., Ex. 145.) And where the reference was to several arbitrators, with power to appoint a new one in case of the death of any, and one died after the award was made, it was remitted to the survivors and to a fresh one to be appointed in pursuance of the power in the submission. (*Lord v. Hawkins*, 2 H. & N. 55.) But where an arbitrator in taking accounts allowed a claim sent to him by one party after the last meeting, without communicating it to the other side, Romilly, M.R., thought it objectionable to send the award back to the same arbitrator because, notwithstanding the perfect honesty and *bona fides* of an arbitrator, it is impossible, where an award has been set aside and sent back upon such grounds, that there should not be, in spite of himself, some disposition to make it appear that the objections to the award were useless. (*Re Tidswell*, 33 Beav. 217.)

Award sent
back to same
arbitrator.

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Powers and
duty of arbi-
trator when
award referred
back.

When matters are referred back, all the original powers of the arbitrator are generally revived. (*M' Rae v. M'Lean*, 2 E. & B. 946.) He must hear additional evidence if the matters remitted require it. Thus, where an award was remitted on the ground that the arbitrator had not finally disposed of a matter submitted to him and with respect to which he had received no evidence, and upon the parties attending before him and tendering evidence he refused to receive it, the court held that he ought to have received it. (*Nickalls v. Warren*, 6 Q. B. 615; 14 L. J., Q. B. 75.) But, if the award is remitted merely for a specific alteration in or addition to it, in a matter upon which no assistance from either party is necessary, the arbitrator need not receive fresh evidence or give any notice to the parties to attend before him; as where the award is remitted that the arbitrator may correct a mistake apparent on the face of the award (*Re Morris and Morris*, 6 E. & B. 383); or determine the amount of costs to be paid by one of the parties (*Ex parte Huntley*, 22 L. J., Q. B. 277; 1 E. & B. 787); or that all the arbitrators may re-execute together, they having originally executed the award at different times and places (*Anning v. Hartley*, 27 L. J., Ex. 145); or that a mistake in the christian name of one of the parties may be corrected. (*Howett v. Clements*, 7 M. & G. 1044.) And, in the latter case, it is sufficient if the arbitrator merely certifies that the award ought to be amended in the name without actually amending it. (*Davies v. Pratt*, 25 L. J., C. P. 71; 16 C. B. 586.) Where an arbitrator not having decided an issue on an account stated, the court directed the award to be sent back to him to be corrected in this particular: it was held that he was not bound to rehear evidence. (*Bird v. Penrice*, 6 M. & W. 754.) So, where neither party requested the arbitrator to hear fresh evidence. (*Baker v. Hunter*, 16 M. & W. 672.)

When a matter is remitted back to an arbitrator, who has made an award, for reconsideration, that award is avoided altogether. (*Dare Valley Rail. Co. v. Rhys*, 38 L. J., Ch. 417; L. R., 4 Ch. 554.) But if an award, good as to three points and bad as to the fourth, is sent back as to that alone, the arbitrator is *junctus officio* as to the three, and cannot alter his judgment as to them. (*Johnson v. Latham*, 20 L. J., Q. B. 238, *per* Erle, J.)

The court can provide for costs on remitting, and where the submission gives the arbitrator power over costs the court on sending the award back to him may direct that the costs of the motion to remit shall be in his discretion. (Arbitration Act, 1889, s. 20; *Pearson v. Overell*, 12 W. R. 709.)

The amended award need not recite the order referring the matter back, and if it misrecite it, it is immaterial. (*Baker v. Hunter*, 16 M. & W. 672.)

Where an award is remitted the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order. (Arbitration Act, 1889, s. 10 (2).)

In addition to the power of the court to remit upon the grounds hereinbefore considered, a further power to remit exists in the case of a compulsory reference. The R. S. C. 1883 have given a right of appeal from an award made upon a compulsory reference, and to that extent placed such a reference on an entirely different footing to a reference by consent. Upon the hearing of the appeal the court may, amongst other things, remit the matter in dispute to the arbitrator. The rule, which is not very clear, is as follows:—Where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator or referee upon any question of law; and on the application of any party the court may set aside the award on any ground on which the court

Time for
award when
remitted.

Power to re-
mit upon ap-
plication by
way of appeal
from award
on a compul-
sory reference.

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might set aside the verdict of a jury. Such appeal shall be to a divisional court, who shall have power to remit all or any part of the matter in dispute to the arbitrator or referee, or to make any order with respect to the award or certificate, or all or any of the matters in dispute that may be just. (R. S. C. Order LIX. r. 3, and 47 & 48 Vict. c. 61, s. 8; *Munday v. Norton* [1892] 1 Q. B. 403; 61 L. J., Q. B. 456.)

It is doubtful if the rule has any application since the repeal of the C. L. P. Act, 1854, for compulsory reference to "arbitration" in the sense in which it was understood when the rule was framed has ceased to exist. A compulsory reference to referees is a different thing. (*Munday v. Norton*, *supra*.)

No time is limited for the appeal.

It is not clear how the evidence taken before the arbitrator is to be brought before the court, whether by affidavit or production of the notes of the arbitrator. (See *Doe v. Preston*, 3 D. & L. 768.)

CHAPTER XVI.

EFFECT OF AN AWARD.

IN the case of a reference by consent out of court, a valid award is final and binding on the parties and privies (Arbitration Act, 1889, s. 2, sched. 1, cl. (h)), and is conclusive as to the matters submitted, debarring the parties both from appeal (*Goodman v. Sayers*, 2 J. & W. 259; *Re Durham County, &c. Building Society*, 41 L. J., Ch. 164; L. R., 7 Ch. 45), and from again litigating the same subject-matter. (*Dudgeon v. Thomson*, 1 Macq. 714; *Williams v. Mouldsdale*, 7 M. & W. 134; *Price v. Price*, 9 Dow. 334.)

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Where reference out of court.

An order of reference by consent, of an action and other matters in difference, stands upon the same footing as a reference by consent out of court. It is final, and can only be reviewed upon the same grounds as the latter. (*Darlington Wagon Co. v. Harding* [1891] 1 Q. B. 245; 60 L. J., Q. B. 110.)

Where reference of action with other matters.

Where an action alone, is by an order of court, referred to an arbitrator the award shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury. (Arbitration Act, 1889, s. 15 (2).)

Where action alone referred.

We have seen (*ante*, p. 210) that the arbitrator has power to direct judgment to be entered. When he has done so either party may move to set aside the judgment.

The effect, and mode of dealing with the report or award of an official or special referee, will be considered more fully in Chapter XIX.

Reference to official or special referee.

If the award is good on the face of it, and neither party has taken steps to impeach it, each party is prohibited from objecting to it, and as to all matters

Res judicata.

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which it professes to decide, it as much precludes the parties from alleging anything contrary to the award as a judgment would, on the ground that it is *res judicata*. (*Cummings v. Heard*, 39 L. J., Q. B. 9; L. R., 4 Q. B. 669; *Parkes v. Smith*, 19 L. J., Q. B. 405; 15 Q. B. 297; *Martin v. Boulanger*, 49 L. T. 62.) But where a plaintiff had filed a bill in chancery against a defendant for infringing his patent, and for an injunction, and the matter was referred to an arbitrator, who decided by inference, but by inference only, that the plaintiff was the true and first inventor, and therefore that the letters patent were not void—this might be collected from the award, but was not so stated directly or positively—it was held in an action afterwards, by the same plaintiff against the same defendant, that the defendant was not estopped by that award from denying that the plaintiff was the true and first inventor, and therefore that the patent was void: an award in that form being no estoppel. (*Newall v. Elliot*, 1 H. & C. 797; 32 L. J., Ex. 120.)

Excessive
award sus-
tained if
against good
faith to treat
it as void.

Though a submission may be in excess of the powers of one of the parties, or the award in excess of the arbitrator's authority, yet if one party have given up any right, or placed himself in a worse position, upon the faith of the excessive instrument being binding, the court will hold it binding, since it would be against good faith to allow it to be treated otherwise. (*London and North Western Rail. Co. v. Bedford*, 17 Q. B. 978; *Leicester Waterworks Co. v. Cropstone Overseers*, 44 L. J., M. C. 92; 32 L. T. 567.)

An arbitrator's decision upon a question of fact is conclusive; and where the claims of the plaintiff in an action were referred it was held that the arbitrator's decision that a certain claim made by the defendant was within the submission was conclusive. (*Faviell v. Eastern Counties Rail. Co.*, 2 Ex. 344; 17 L. J., Ex. 297.) But

an arbitrator's decision as to the extent or limit of his authority is not in all cases conclusive. (*Ib.*; *Toby v. Lovibond*, 5 C. B. 770; 17 L. J., C. P. 201; *Hutcheson v. Eaton*, 13 Q. B. D. 861; 51 L. T. 846.)

Ordinarily the rights of a stranger will not be affected by an award. (*Thompson v. Noel*, 1 Atk. 60.)

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Effect of
award on
rights of
strangers.

An award against a principal debtor is not binding upon a surety, or evidence against him in an action by the creditor, unless the surety shall have agreed in the plainest terms to be bound by such award. (*Ex parte Young, Re Kitchin*, 50 L. J., Ch. 824; 17 Ch. D. 668.) But a stranger may be bound by acquiescence, and where A., having a claim on property which he knew was the subject of a reference between C. and D., suffered the award to be made without bringing forward his claim, Shadwell, V.-C., held that he was bound by the award. (*Gorett v. Richmond*, 7 Sim. 1.) So, if the trustees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objections to the proceedings, they will be considered as adopting them, and be bound by the decision. (*Dod v. Herring*, 1 Russ. & M. 153.) And in an old case, where an award was made in an adverse suit between A. and B., and confirmed by the court, A. being then a bankrupt, but not being known to be so, a commission was afterwards taken out, and the award was held to bind the assigns under the commission. (*Whitacre v. Pawlin*, 2 Vern. 229.)

The award is binding upon every one claiming through or under the parties to the reference, though claiming adversely to them. (*Martin v. Boulanger*, 52 L. J., P. C. 31; 8 App. Cas. 296.)

An award is conclusive as to all such matters in difference between the parties, as are within the scope of the reference, notwithstanding they were not brought before the attention of the arbitrator; for if one of the

Effect of
award on
matters in
difference not
brought be-
fore arbi-
trator.

CHAP. XVI. parties has neglected to bring before the arbitrator any matter when he might have done so, he cannot afterwards maintain an action on such matter, or take advantage of it in answer to a motion to enforce the award. Thus, where the reference was of "all actions and causes of action between the parties," and after the award made, the party thereby ordered to pay a sum of money, wished to deduct from it a sum due to him from the opposite party, and which had not been under the consideration of the arbitrators, the court held that he could not do so, for the order of reference was large enough to include that transaction, and it should have been discussed before the arbitrators. (*Smith v. Johnson*, 15 East, 213.) And where an action by a person for his salary, and also for damages for dismissal from service, was referred, and the plaintiff gave evidence of dismissal, but claimed no damages for it, before the arbitrator, who only awarded the amount of the salary, it was held that the award was nevertheless a bar to a second action for damages for the dismissal. (*Dunn v. Murray*, 9 B. & C. 780.) So, where an arbitrator to whom an action of ejectment and all matters in difference were referred, with a provision that the arbitrator should decide what compensation should be paid to the plaintiffs for lands which the defendants, a railway company, had taken for the purpose of their railway, the terms of the reference being wide enough to embrace a claim for mesne profits, it was held to be concluded by the award, though it had not been specifically set up before the arbitrator. (*Smalley v. Blackburn Rail. Co.*, 27 L. J., Ex. 65; 2 H. & N. 158.)

But a reference of "all matters in difference" does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of reference, but not then a matter in difference. (*Ravee v. Farmer*, 4 T. R. 146; *Thorpe v. Cooper*, 5 Bing. 129.)

An award is only conclusive as to the questions actually referred (*Oxenham v. Lemon*, 2 D. & R. 461), and a reference of the quantum of a demand, does not waive an objection to the legality of it. (*Steers v. Lashley*, 1 Esp. 166.)

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Award conclusive only on the points referred.

A reference under the L. C. C. Act, 1845, is only to assess compensation, and the award determines nothing as to the title of the claimant to receive the compensation, which, if disputed, must be established by an action (*ante*, p. 26), and so, in the case of a reference under the Public Health Act, 1875. (*Ante*, p. 29.)

Where all matters in difference are referred to an arbitrator, an award, directing the execution of mutual general releases, closes all accounts between the parties up to the time of the submission. (*Trimingham v. Trimingham*, 4 N. & M. 786.) But where the generality of the words of a release, executed according to the directions of an award, might extend to a matter the parties did not intend the arbitrators to adjudicate upon, and upon which they did not adjudicate, the generality of the words will be restrained by the intention of the parties. (*Upton v. Upton*, 1 Dow. 400.)

Award of general releases.

Except the reference be under a statute giving an award the effect of a conveyance, an award that one person shall convey land, or any interest in land, will not itself operate as a conveyance (Rolle, Ab. "Arb." A. 3; *Marks v. Marriot*, 1 Ld. Raym. 114; *Henry v. Kirwan*, 9 Ir. C. L. Rep., N. S. 459), or as a partition of lands between tenants in common (*Johuson v. Wilson*, Willes, 248), but the arbitrator must direct the execution of conveyances.

Award will not convey land.

The property in a chattel cannot be transferred by the mere force of an award. (*Hunter v. Rice*, 15 East, 100; *Thorpe v. Eyre*, 1 A. & E. 926.)

or transfer a chattel.

But an award may ascertain the right to any species of property, so as to give the party in whose favour it

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is made a possessory remedy for the recovery of it; for if two persons submit to arbitration a dispute respecting the right to certain land or other property, when the arbitrator ascertains to whom the property belongs, the parties are concluded by the award. (*Doe v. Morris v. Rosser*, 3 East, 15.) And if the arbitrator award that one of the parties is entitled to possession of land, the court can give effect to his finding (*Wade-Gery v. Morrison*, 37 L. T. 271), though the provision of 17 & 18 Vict. c. 125, s. 16, is omitted from the Arbitration Act, 1889.

Sum awarded
creating a
debt.

An award that one person shall pay to another a sum of money will create a debt from the one party to the other, the payment of which may be enforced by action or on an application to enforce the award. An award under the L. C. C. Act, 1845, does not, however, create a debt until the title of the claimant has been made out and accepted (*Re Milford Docks Co., Ex parte Lister*, 48 L. T. 560; 23 Ch. D. 292; 52 L. J., Ch. 774), nor can payment of the sum awarded be enforced by summons, but only by action. (*Re Walker and Beckenham Local Board*, 50 L. T. 207.)

A sum of money due upon an award is provable in bankruptcy, and is a good petitioning creditor's debt (*Ex parte Lingood*, 1 Atk. 240; *Ex parte Harding*, 5 De G. M. & G. 367), unless the award be bad upon the face of it, or the submission be void. (*Antram v. Chace*, 15 East, 209; *Dutton v. Morrison*, 17 Ves. 193.) And the sum awarded will carry interest from the day appointed for payment, which interest may be recovered by action, or summons, or by including it in a judgment entered up on a verdict in pursuance of an award. (R. S. C. Order XLII. r. 16.)

An award as
a defence to
action for
same matter.

Where an action is brought for the same cause of action upon which an award has been made between the parties, the award is a good defence to the action.

(*Ante*, p. 249.) In order to give it in evidence as a defence, the award must be pleaded specially.

Wherever accord and satisfaction would be a good defence, an award may be pleaded. If A. have the custody of the cattle of B., and the cattle commit a trespass on the land of C., and A. and C. submit this trespass to arbitration, and an award is made; the award is a good defence to an action for the same trespass brought by C. against B. (Rolle, Ab. "Arb." B. 1.) And in an action brought against A. a plea by him of an award, for the same cause, between the plaintiff on the one side and A. and another jointly on the other side, is a good defence. (*Thomlinson v. Arriskin*, Comyn, 328.) So, an award made between one of several trespassers and the plaintiff, and performance, will bar an action against the others, for this is satisfaction. (Rolle, Ab. "Release," G. 2; *Peytoe's Case*, 9 Rep. 78.)

It has been decided that whenever the award gives a new duty in lieu of the former, or awards any collateral matter in satisfaction of a debt or grievance, it is not necessary in pleading the award to aver performance. (*Gascoyne v. Edwards*, 1 Y. & J. 19; *Cummings v. Heard*, 39 L. J., Q. B. 9; L. R., 4 Q. B. 669; *Allen v. Harris*, 1 Ld. Raym. 122; *Freeman v. Bernard*, 1 Salk. 69; *Purslow v. Baily*, 2 Ld. Raym. 1039.) But, where the award merely ascertains the amount of the debt to an action for debt, an award is not a good plea without an allegation of performance. Thus, where to an action of assumpsit for 150*l.* for tolls, it was pleaded that differences respecting that claim had arisen between the plaintiff and defendant, and they had mutually agreed to refer the said matter to the award of an arbitrator, who made his award of and concerning the matter submitted to him, and thereby awarded that the defendant should pay to the plaintiff 13*l.*; this plea on demurrer was held bad without an averment of payment of the sum awarded.

CHAP. XVI. Lyndhurst, C.B., in delivering the judgment of the court, said: "The matter for the consideration of the arbitrator was whether there was any and what debt; the award only ascertains that there is a debt, specifies the amount, and directs payment, but the money until paid is due in respect of the original debt, *i.e.*, for tolls; its character remains the same; nothing is done to vary it snature or destroy its original character;" and added that, as the money payable under the award was nothing but the original debt so ascertained in amount, the plea was bad. (*Allen v. Milner*, 2 C. & J. 47.)

A plea, except as to a certain sum, that an arbitrator had awarded that sum as the sum due in respect of the causes of action, was held good. (*Cummings v. Heard*, 39 L. J., Q. B. 9; L. R., 4 Q. B. 669.)

Defence to
action in
Chancery
Division.

An award is also a good defence to an action in the Chancery Division seeking to disturb the matter adjudicated upon in the arbitration. (*Tittenson v. Peat*, 3 Atk. 529; *Dryden v. Robinson*, 2 S. & S. 529.)

An award as
evidence.

A valid award, like the judgment of a competent court of judicature, is conclusive evidence as between the parties to it upon all the matters included in it. (*Sybray v. White*, 1 M. & W. 435; *Whitehead v. Tattersall*, 1 A. & E. 491.) But it has no force as against strangers, for, unlike a verdict or judgment, it cannot be received as evidence in the nature of reputation. (*Evans v. Rees*, 10 A. & E. 151; *Wenman v. Mackenzie*, 5 E. & B. 447; 25 L. J., Q. B. 44.) On an indictment for not repairing a road, which it was alleged the defendant was bound to repair *ratione tenuræ*, an award made in pursuance of a submission by a former tenant, whereby it was awarded that the occupier of that farm, and not the parish, was bound to repair the road, was refused in evidence, since the landlord was no party to the submission, and it could not be received as evidence of reputation, for it was *post litem motam*. (*R. v. Cotton*, 3 Camp. 444; 1 Phillips on Evidence, 186, 195.)

An award is not evidence of an account stated between the parties to the submission (*Bates v. Townley*, 19 L. J., Exch. 399; 2 Ex. 152); unless perhaps in the single event of there being no regular agreement to refer, and consequently no award capable of being enforced in law. In such a case, as the arbitrator is not a judge, he might possibly be deemed to be the agent of the parties for the purpose of settling their accounts. (2 Taylor on Evidence, 1503; *Keen v. Batshore*, 1 Esp. 194.)

It has been held that an award is not admissible in evidence to establish the truth of the facts on which it is rendered, against a party to be affected by the proof of it in a criminal case. (*R. v. Fontaine Moreau*, 11 Q. B. 1028; 17 L. J., Q. B. 187.)

Questions rarely arise as to what is and what is not a sufficient performance of an award, or what is a breach of performance of the particular award. Each party is bound to comply substantially with the directions of the award so far as regards himself, and a party seeking a remedy for non-performance must show that he has performed or tendered performance of all conditions precedent and concurrent acts on his part to be performed. Upon an award for the payment of money at a particular time and place, the party who is to pay ought to come and tender the money accordingly, even if the other party is not there to receive it. (*Doyley v. Burton*, 1 Ld. Raym. 533.) If no time and place be mentioned, money awarded to be paid is payable on request. If the award be good in part and bad in part, it is sufficient to perform that part which is good. So, in all cases, a substantial compliance with the award is sufficient. (*Hanson v. Boothman*, 13 East, 22; *Doddington v. Bailward*, 7 Dow. 640; *Sharpe v. Hancock*, 7 M. & G. 354.) The rule of performance *cy près* is applicable to awards as well as to agreements.

Performance
of an award.

CHAPTER XVII.

SETTING ASIDE AN AWARD.

SECT. 1.—*Grounds for setting aside an Award.*

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Power to set
aside—reference out
of court ;reference by
order of court.

Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside. (Arbitration Act, 1889, s. 11 (2).)

This applies to every award under a submission in writing out of court, which now has the same effect as if it had been made an order of court. (Arbitration Act, 1889, ss. 1, 27.)

By section 16 of the Act the court or a judge, as to references under order of the court, have all the powers which by the Act are conferred on the court or a judge as to references by consent out of court.

An application to set aside an award cannot be made at chambers.

It may be necessary to promise, at the outset, that every ground of relief available in equity against an award is equally open in both divisions of the court, upon motion to set it aside (*R. v. Wheeler*, 3 Burr. 1258; *Lingood v. Eade*, 2 Atk. 504; *Grafham v. Turnbull*, 44 L. J., Ch. 538); and that in considering an award upon an application to set it aside, the court will make no distinction between legal and lay arbitrators, or treat the awards made by the one in any manner differently from those made by the other. (*Jupp v. Grayson*, 1 Cr. M. & R. 523; *Huntig v. Ralling*, 8 Dow. 879.)

On the principle *de minimis non curat lex*, the court refused an application to set aside an award where the matter in dispute was trivial (only two guineas) as compared with the total amount adjudicated upon (*Brown v. Hellaby*, 26 L. J., Ex. 217; 1 H. & N. 729), but where the award was void for the misconduct of the arbitrators in taking evidence in the absence of the parties, the court set it aside, though the matter in dispute amounted only to a few shillings. (*Re Plews and Middleton*, 6 Q. B. 845; 14 L. J., Q. B. 139.)

Matter in dispute of trifling value.

A stipulation in a submission that neither party will attempt to set aside the award for alleged misconduct of the arbitrator, is valid. (*Tullis v. Jackson* [1892] 3 Ch. 441.)

The grounds upon which an award will be set aside may be conveniently considered under six heads.

1. Where the award is invalid, as not being certain, or final, or not embracing all matters submitted to the arbitrator. It has already been stated what awards are good and what bad, and it is sufficient here to say, that if an award be clearly bad, for matters apparent on the face of the award, or for matters extrinsic, as for not being certain, or final, or for an excess of authority in the arbitrator, or for the cause that all matters submitted have not been determined by the arbitrator, the court will set the award aside, in the whole, or in part, according to the circumstances of the case; but if the question whether the award be good or not be doubtful, the court will neither grant an attachment nor set aside the award, but leave the parties to discuss the question of the sufficiency of the award in an action, because, if set aside on motion, there is an end of it altogether, whereas, if an action be brought, the question of its validity may be in general more formally raised, and taken to a court of error.

1. The award uncertain, not final, &c.

2. Mistake of the arbitrator. In considering this branch of the subject it is necessary to bear in mind the

2. Mistake in law or fact.

CHAP. XVII

Compulsory
reference.

distinction between an arbitrator acting under a reference by consent and a compulsory reference. From the former there is no appeal, from the latter there is. Where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator upon any question of law; and on the application of any party the court may set aside the award on any ground on which the court might set aside the verdict of a jury. (R. S. C. Order LIX. r. 3.) We have previously (*ante*, p. 247) considered the construction of this rule.

Reference by
consent.

In the case of a reference by consent, it is necessary to recognize the distinction between a mistake as to jurisdiction, and a mistake on the merits within the jurisdiction. Where an award is good on the face of it, but the arbitrator has made a mistake either of law or fact, if that mistake has been as to a matter within the arbitrator's authority, then, inasmuch as there is no court of appeal from the arbitrator, the mistake cannot be remedied (*Stimpson v. Emmerson* (1847), 9 L. T., O. S. 199; *Adams v. Great North of Scotland Rail. Co.* [1891] A. C. 31, 39); nor can the court, even in the exercise of its equitable jurisdiction, set aside the award unless it can be shown that there was misconduct or some other equitable ground for interference. But if the mistake has been as to the extent and nature of the arbitrator's authority leading him to exceed it (*Hutcheson v. Eaton*, 13 Q. B. 861; 51 L. T. 846), then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction. (*Bucclench v. Metropolitan Board of Works*, 39 L. J., Ex. 137, *per* Blackburn, J.; *Jones v. Corry*, 5 Bing. N. C. 187; *Great Western Rail. Co. v. Waterford and Limerick Rail. Co.*, 50 L. J., Ch. 513.)

As to a mistake on matters within the arbitrator's CHAP. XVII. jurisdiction, it may be laid down as a general rule, that the court will not set aside an award under a reference by consent on the ground of mistake by the arbitrator on a question of law or of fact, unless the mistake appear upon the face of the award, or in some writing contemporaneous with, and intended to form part of it. (*Kent v. Elstob*, 3 East, 18; *Sharman v. Bell*, 5 M. & S. 504; *Williams v. Jones*, 5 M. & R. 3; *Payne v. Massey*, 9 Moore, 666.) Thus, where the amount due on a London apothecary's bill was referred, the court refused to allow the award to be impeached by affidavits showing that the arbitrator had included in the amount awarded certain illegal charges, as the objection did not appear on the face of the award. (*Gensham v. Germain*, 11 Moore, 1.) And the court refused to set aside an award where the arbitrator had allowed transactions apparently illegal, as premiums for an insurance to a hostile port, the legality of the ground of insurance being for the consideration of the arbitrator. (*Wohlenberg v. Lageman*, 6 Taunt. 254.) A mistake as to foreign law is a mistake of fact, and is not a reason for setting aside an award. (*Imperial Royal Chartered Azienda v. Funder*, 21 W. R. 117.)

It cannot be alleged as ground for setting aside an award on a reference by consent, that it is contrary to the evidence. (*Re Bradshaw's Arbitration*, 12 Q. B. 562; 17 L. J., Q. B. 362.)

As an arbitrator under a reference by consent is a judge, voluntarily chosen by the parties to decide between them, they cannot object to his decision, whether in the form of an award or certificate (*Price v. Price*, 9 Dow. 334), that it is unreasonable, or a judgment against law (*Baguley v. Markwick*, 30 L. J., C. P. 342; 10 C. B., N. S. 61; *Fuller v. Fenwick*, 3 C. B. 705; 16 L. J., C. P. 79; *Fariell v. Eastern Counties Rail. Co.*,

CHAP. XVII. 2 Ex. 344; 17 L. J., Ex. 297), or an erroneous judgment on the facts. (*Morgan v. Mather*, 2 Ves. jun. 15.) The result of the cases is thus summarized by Williams, J., in *Hodgkinson v. Fernie* (3 C. B., N. S. 189), "The law has for many years been settled, and remains so to this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact. Many cases have fully established that position where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, 'You have constituted your own tribunal; you are bound by its decision.' The only exceptions to that rule are cases where the award is the result of corruption or fraud, and the one other, which, though it is to be regretted, is now, I think, firmly established, namely, where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established." (*Dinu v. Blake*, 44 L. J., C. P. 276; L. R., 10 C. P. 388; *ante*, p. 243.)

If parties submit to an arbitrator the decision of a bare point of law, and he give an erroneous decision, his award is binding notwithstanding. (*Steff v. Andrews*, 2 Mad. 6; *Ching v. Ching*, 6 Ves. 282.)

If the parties submit to an arbitrator a mixed question of law and fact, they impliedly impose upon him the obligation to determine their rights by the application of the rules of law to the facts established in evidence before him, and his award may be good or bad, as it appears upon the face of the award that he has properly done so. When the arbitrator is silent in his

award as to his law, the court cannot interfere though he be wrong. (*Boutillier v. Thick*, 1 D. & R. 366.) When he professes to decide according to law, but does not do so, if the mistake appear on the face of the award, or is disclosed by some contemporaneous writing, the court will set it aside. (*Hogg v. Burgess*, 3 H. & N. 293; 27 L. J., Ex. 318; *per* Watson, B.) But, if the award be good on the face of it, the court will not admit an affidavit or after-written letter of the arbitrator to show that the arbitrator was mistaken in fact or law (*Holgate v. Killick*, 31 L. J., Ex. 7; 7 H. & N. 418; *Brown v. Nelson*, 13 M. & W. 397); nor even a contemporaneously written letter, unless such letter substantially forms part of the award, and was intended so to do. (*Ante*, p. 244.) Thus, where an award was accompanied by a letter from the arbitrator to one of the parties only, stating that he had not made any award as to the costs because he considered he had no power to do so, the award being good on the face of it, the court refused to look at the letter, as it did not form part of the award. (*Leggo v. Young*, 16 C. B. 626; 24 L. J., C. P. 200.)

The courts will not allow the award to be impeached on the ground of the arbitrator's mistake, except the arbitrator admits the mistake and himself craves the assistance of the court (*Dinn v. Blake*, 44 L. J., C. P. 276; L. R., 10 C. P. 388), and not always then, for the courts have refused to allow an arbitrator to impeach his award, on the ground that the legal effect of it is different to what he supposed it would be. (*Greenwood v. Brownhill*, 44 L. T. 47; *Allen v. Greenslade*, 33 L. T. 567.)

Where a gross mistake is made by an arbitrator, though not apparent on the face of the award, the court will sometimes set aside the award on the ground that the mistake as a matter of carelessness amounts in

CHAP. XVII.

a judicial sense to misconduct in the arbitrator; as where A. claiming two sums to be due to him from B., the contention before the arbitrator is merely whether A. is entitled to both or only one of those sums, and the arbitrator, meaning to give A. both sums, instead of adding them together deducts the smaller from the larger, and instead of directing the payment to be made by B. to A., awards that the payment shall be made by A. to B. (*Re Hall and Hinds*, 2 M. & G. 847; 10 L. J., C. P. 210; *Ashton v. Pointer*, 2 Dow. 651; and see *Flynn v. Robertson*, 38 L. J., C. P. 240; L. R., 4 C. P. 324.)

The decisions on the power of the court to set aside an award for a mistake by the arbitrator are now of less importance than formerly, for the court having power in all cases to remit the award to the arbitrator for his reconsideration, it is conceived that no award will now be set aside for any defect which the arbitrator could cure, but that in all such cases it will be remitted to him. Many of such mistakes can now be corrected under the slip section. (Arbitration Act, 1889, s. 7 (c).)

3. Irregularity
in the pro-
ceedings.

3. Irregularity in the proceedings, such as want of notice of the meetings, or improper conduct of the arbitrator in receiving evidence. These points have been already fully considered. (*Ante*, Chap. XI.)

4. Corruption
in the arbi-
trator.

4. Corruption or misconduct of the arbitrator, or a secret interest in the matters referred, or bias. (*Ante*, Chap. X.) It is seldom, at the present day, that any actual corruption or fraud is to be found in the conduct of arbitrators, but there may be ample misconduct in a legal sense when there is no moral culpability. (*Re Hall and Hinds*, 2 M. & G. 847.)

Interest or
bias.

Generally an award will be set aside if, unknown to one of the parties, the arbitrator has an interest in the matters referred to him (*ante*, p. 103), or he is in such a position, or his conduct has been such that he is likely

to be biassed in favour of one of the parties (pp. 104, 108). CHAP. XVII.
Where an umpire sat with arbitrators, one of whom was secretly interested in the matters referred, the umpire's award was set aside. (*Blanchard v. San Fire Office*, 6 Times L. R. 365.)

Accepting hospitality during the arbitration from one of the parties in the absence of the other may cause the award to be set aside (*ante*, p. 109). Accepting hospitality.

It will be sufficient ground for setting aside an award that the arbitrator has heard one party and not the other, or held private communications with one of the parties on the subject-matter of the reference, or, unless properly proceeding *ex parte*, has taken the evidence of the one side in the absence of the other, or has taken evidence in the absence of both parties (*ante*, p. 143). A mistake in the law of evidence, as to what is admissible and what not, will not be ground for setting aside the award (p. 140). Misconduct in matters of evidence.

It may be ground for setting aside an award that the arbitrator has not acted fairly and equitably between the parties—as, for example, that he has not given each party reasonable opportunity of having his whole case heard, or of procuring evidence, or of having his case fully put before the arbitrator, or of obtaining the assistance of counsel where the other side unexpectedly appears by counsel. Not acting fairly and equitably.

So, if he has decided without hearing evidence tendered, which is material and relevant to the determination of the matters in difference, or without hearing any evidence, unless the reference is to an expert to decide according to his skill (pp. 125, 142). Deciding without evidence.

The award will be set aside where a competent number of joint arbitrators have executed the award, but have acted without consultation with, or notice to, the other arbitrators (p. 111). And so where one arbitrator has delegated his authority to his co-arbitrator or to some other person (pp. 115, 147). Joint arbitrators acting without consulting with others.

CHAP. XVII.

Umpire appointed or acting improperly.

Excessive charges for fees.

Corruption.

5. Concealment of evidence by the parties.

The award of an umpire may be set aside if he has been improperly appointed by lot (p. 120), or if he refuse to hear evidence or further evidence than that given before the arbitrators (p. 124).

It is an open question whether an excessive and extravagant charge by an arbitrator for fees, made by him in his award, and as part of his award, might not be such misconduct as to justify the court in setting the award aside. (*Re Prebble and Robinson* [1892] 2 Q. B. 604.)

Corruption in the arbitrators, or their conduct in proceeding contrary to the principles of natural justice, is ground for setting aside the award. (*Morgan v. Mather*, 2 Ves. 15, 18.) But in one case a motion to set aside an award was refused upon the mere evidence of an admission out of court by an arbitrator that he had acted corruptly and in consequence of a bribe. (*Re Whiteley and Roberts* [1891] 1 Ch. 558; 60 L. J., Ch. 149.)

5. An award will be set aside when it appears that one party has obtained the decision in his favour by fraud or concealment of material circumstances, such as would, if disclosed to the arbitrator, have altered his judgment. (*South Sea Company v. Bumstead*, 2 Eq. Ca. Ab. 80; *Medcalf v. Ives*, 1 Atk. 63.) But an award will not be set aside, or referred back to the arbitrator, on the ground of the discovery of fresh evidence since the award, unless it be stated that it is evidence which reasonable diligence could not have obtained before the arbitrator made his award. (*Eardley v. Otley*, 2 Chitt. 42.) The court refused to set aside an award where it appeared that the arbitrator, having power to examine the parties, had examined one of the parties who it was afterwards discovered had been transported, and had returned from transportation before the expiration of his term (and then incompetent as a witness), it appearing from the arbitrator's statement, that he had excluded from his judgment the testimony

of both parties as unworthy of credit. (*Smith v. Sainsbury*, 9 Bing. 31.) In *Pilmore v. Hood* (8 Dow. 21) the court refused to set aside an award on the ground that the arbitrator had been misled by the evidence of a witness who might have been cross-examined but was not. It is no ground for setting aside an award that the unsuccessful party suffered a surprise, as an arbitrator would have power to postpone the proceedings upon any reasonable application for that purpose. (*Solomon v. Solomon*, 28 L. J., Ex. 129.)

The court will not set aside an award although the affidavit in support of the application disclose strong imputations upon the testimony of a material witness who was examined before the arbitrator. (*Scales v. East London Waterworks Co.*, 1 Hodg. 91.) Nor will the court set aside an award on the ground that the order of reference has been fraudulently obtained; the application ought to be to set aside the order of reference, and should be made within due time after the order was obtained. (*Sackett v. Owen*, 2 Chitt. 39.)

Fraud and perjury.

6. If an award be void the court will not on that ground set it aside, if nothing can be done upon it without suit or application to the court; but if the party can enforce it without applying to the court to enable him to do so—as, for instance, if the award order a verdict to be entered—the court will set it aside, though the submission has been revoked, since otherwise the party might proceed to judgment and execution upon it. (*Doe v. Brown*, 5 B. & C. 384.)

6. When void award set aside.

Before taking any proceedings to impeach an award it should be considered whether anything has been done to waive the objection to it. Many objections in themselves fatal to an award, such as irregularity in the proceedings of the arbitrator or other misconduct on his part, may be waived by a party proceeding in the reference after the objection comes to his knowledge,

Waiver of objections to an award.

CHAP. XVII. unless he do so under protest. We have from time to time noticed acts amounting to a waiver of objections. (*Ante*, pp. 107, 145, 151.)

SECT. 2.—*Time limited for Moving to set aside an Award.*

Time allowed
—until last
day of next
sittings.

“An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties.” (R. S. C. Order LXIV. r. 14.)

If the award be made in vacation, an application to set it aside must be made *before* the last day of the next sittings; but if the award be made during the sittings, the parties have until the last day of the following sittings to make the application. (*Re Burt*, 5 B. & C. 668; *Allenby v. Proudlock*, 4 Dow. 54.) “Before the last day of the next” sittings is construed strictly against the person moving to set aside the award, and the “application” must be actually made before, and cannot be made on, the last day of sittings. (*Re Evans*, 4 M. & G., 767; *Re Holloway and Monk*, 8 Dow. 138; *Reynolds v. Askeu*, 5 Dow. 682; *Freame v. Pinneger*, 1 Cowp. 23; *Re Corporation of Huddersfield and Jacomb*, 43 L. J., Ch. 748; L. R., 17 Eq. 476.)

What is a
sufficient
“application.”

Service of a notice of motion, with or without an affidavit in support, on the opposite side, is “an application.” It is not necessary the motion itself should be heard in open court before the last day of sittings. (*Re Gullop and Central Queensland, &c. Co.*, 25 Q. B. D. 230; 59 L. J., Q. B. 460; *Re Corporation of Huddersfield and Jacomb*, *supra*, on appeal, 44 L. J., Ch. 96; L. R., 10 Ch. 92; *Smith v. Parkside Mining Co.*, 29 W. R. 154; 50 L. J., Ex. 144; 6 Q. B. D. 67.)

Power of court
to extend
time.

Order LXIV. r. 7, which enables the court or a judge to enlarge the time for taking proceedings, has been held

by Kekewich, J., to give jurisdiction, on good cause shown, to extend the time for moving to set aside an award. (*Re Oliver and Scott*, 43 Ch. D. 310; 59 L. J., Ch. 148.)

Before the repeal of the statute of William the Third which fixed the time for applying to set aside an award, it was considered that the court had no power to alter the statute. (*Re College of Christ and Martin*, 3 Q. B. D. 16.) Accordingly the court would not, after the expiration of the statutory period, entertain a motion, even by consent of the parties (*Re North British Rail. Co.*, 35 L. J., C. P. 262; L. R., 1 C. P. 401), to set aside an award on any account whatever (*Reynolds v. Askew*, 5 Dow. 682), even for objections appearing on the face of the award (*Lounides v. Lounides*, 1 East, 276); and even although a portion of the delay was caused by the opposite party improperly preventing the submission being made a rule of court (*Smith v. Blake*, 8 Dow. 133); or by the party not knowing the contents of the award, owing to the arbitrators refusing to give it up until they were paid excessive fees. (*Moore v. Darley*, 1 C. B. 445.) If, however, any attempt were made to enforce the award by attachment, the application could be resisted at any time whatever, for defects appearing on the face of the award. (*Pedley v. Goddard*, 7 T. R. 73.)

In cases not within the repealed statute (9 & 10 Will. 3, c. 15, s. 2—for it did not apply to references by order of court or order at *nisi prius*) the courts, in the exercise of their discretion, were accustomed to allow further time for motions provided very clear and sufficient reasons were given for the delay. (*Rawsthorn v. Arnold*, 6 B. & C. 629; *Hemsworth v. Brian*, 7 M. & G. 1009; 14 L. J., C. P. 36; *Reynolds v. Askew*, 5 Dow. 682.)

Cases
in which
further time
allowed.

These decisions may be usefully considered in connection with any proposed application for extension of time under Order LXIV. r. 7. Thus, where a rule was

CHAP. XVII. obtained in time but discharged on grounds purely technical, the court granted a new rule in the second term after the publication. (*Sherry v. Oke*, 3 Dow. 349.) So, the court entertained a motion after the time had elapsed, when it was impossible for the solicitor to get counsel's opinion as to the validity of the award within time (*Bennett v. Skardon*, 5 M. & R. 10); and likewise when counsel had been instructed to move within the proper time but for some cause failed to do so. (*Rogers v. Dallimore*, 6 Taunt. 111.) So also, where on a reference by a judge's order, the defendant, in whose favour the award was, improperly kept the order of reference from the plaintiff and prevented it being made a rule of court until too late. (*Bottomley v. Buckley*, 4 D. & L. 157.)

But the courts usually require a strong case to justify their departure from the ordinary practice, and it has been held not to be sufficient excuse for lateness that the arbitrator refused to give up his award without payment of an exorbitant sum (*Macarthur v. Campbell*, 5 B. & Ad. 518); or that the party moving did not believe that the other party intended to proceed upon the award, as there had been a previous revocation (*Worrall v. Deane*, 2 Dow. 261); or that he was misled by a statement of the other party, that the latter intended to move to set the award aside (*Emet v. Ogden*, 7 Bing. 258); or that the applicant was in ill health and unable to attend to business (*Guadiano v. Brown*, 2 Jur., N. S. 358); or that the applicant was a trustee of one of the parties to the reference, who had become bankrupt, and that he was only appointed a short time before coming to the court. (*Hobbs v. Ferrars*, 8 Dow. 779.)

From when
time runs.

Time for setting aside the award begins to run from the day the award is published to the parties; that is, from the day notice of it is given to the parties, and not, on the one hand, from the time it is made, or, on the other, from the time it is actually delivered. (*Macarthur*

v. *Campbell*, 5 B. & Ad. 518, dissenting from *Musselbrook*; *CHAP. XVII.*
v. *Dunkin*, 9 Bing. 605, where the Court of Common Pleas considered that an award was only published within the statute when the party might have it by paying a reasonable amount for the arbitrator's charges.)

When an action without other matters in difference is referred to an arbitrator by order of court the award shall, "unless set aside by the court or a judge, be equivalent to the verdict of a jury." This does not mean that the case shall be deemed to have been tried by a jury, but only that the award may be enforced in the same way as the verdict of a jury. (*Glasbrook v. Owen*, 7 Times L. R. 62; *Re Darlington Wagon Co. and Harding* [1891] 1 Q. B. 245, 247, *per Day, J.*) The words "unless set aside by the court or a judge," must not be taken as importing, that under Order LIV. r. 12a, a master in chambers can set aside an award. The application is properly made to a divisional court in the Queen's Bench Division (see *Gower v. Tobitt*, 39 W. R. 193), and in the Chancery Division to the Court of Appeal. (See *Serle v. Fardell*, 44 Ch. D. 299.)

Time in case of reference of action where no judgment directed.

We have seen (*ante*, p. 210) that an arbitrator to whom an action is referred may direct judgment to be entered, and any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong. (Order XL. rr. 2, 6, 6a.) The application in the Queen's Bench Division is to a divisional court; in the Chancery Division to the Court of Appeal direct.

Where arbitrator has directed judgment.

SECT. 3.—*Application and Proceedings thereon.*

The mode of applying to set aside an award is by motion, of which notice must have been given to the other side (R. S. C. Order LII. rr. 1—3), but not to the

Mode of application.

CHAP. XVII. arbitrator. (*Moseley v. Simpson*, 42 L. J., Ch. 739; L. R., 16 Eq. 226.) The notice, which is the ordinary two clear days' notice (Order LII. r. 5), shall state in general terms the grounds of the application, and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion. (Order LII. r. 4.) The non-service of the affidavits with the notice of motion is a mere irregularity which the court may condone. (*Re Wyggeston Hospital and Stephenson*, 52 L. T. 101; 33 W. R. 551; *Hampden v. Wallis*, 26 Ch. D. 746; 50 L. T. 515; *Petty v. Daniel*, 34 Ch. D. 172.)

The application may be to either division of the court.

Where an action is in court the notice of motion and affidavits pro and con should be entitled in the action. Where there is no action in court, the notice of motion and affidavits need only be entitled in the High Court of Justice, and the division in which the application is made, and "In the matter of an arbitration between A. B. and X. Y." And in such a case, adding the words plaintiff and defendant to the names of the parties in the title of the affidavit does not vitiate the affidavit. (*Re Imeson and Horner*, 8 Dow. 651.)

Who may
move to set
aside an
award.

It seems that a party in whose favour a mistake has been made cannot avail himself of it to set aside the award. Therefore, where an arbitrator erroneously found a plea of set-off in part for the plaintiff and in part for the defendant, instead of wholly for the plaintiff, the court refused to set aside the award at the instance of the defendant; and as they had no power to amend they gave the plaintiff the option either of having the award set aside or letting it stand if he were willing to pay the defendant's costs on the issue erroneously found in his favour, the merits not being affected and the order of *nisi prius* precluding a writ of error. (*Moore*

v. *Butlin*, 2 N. & P. 436; *Ward v. Dean*, 3 B. & Ad. 234.) In certain cases acquiescence in the award, as taking a benefit under it, has been held to debar a party from moving to set it aside. Thus, where a party had received the costs of the reference, and of the award, which by the terms of the rule of reference were to be paid to him, the court held that he was precluded from applying to set aside the award. (*Kenward v. Harris*, 2 B. & C. 801.) But requesting time for a week to pay the money awarded, and attending the taxation of costs, is not such an acquiescence as to prevent the party from afterwards moving to set the award aside. (*Hayward v. Phillips*, 6 A. & E. 119.)

A clause in the submission prohibiting the parties from bringing any action or suit respecting the matters referred does not preclude a motion to set aside the award. (*Re Mackay*, 2 A. & E. 356.)

The rule (Order LII. r. 4), only requires that the notice of motion shall state "in general terms" the grounds of the application. It is submitted that usually the notice should state the grounds with the same particularity as was formerly required at common law in the case of a rule *nisi* for setting aside an award. (*Mercier v. Pepperell*, 51 L. J., Ch. 63; L. R. 19 Ch. D. 58.) Therefore, by analogy, it would seem not to be sufficiently specific to state as a ground for the motion "that the arbitrator has exceeded his authority" without specifying how (*Staples v. Hay*, 13 L. J., Q. B. 60); or that the award is uncertain, or not final (*Boodle v. Davies*, 3 A. & E. 200); or "that the arbitrator has not by his said award raised the points of law which on the part of the plaintiff he was requested to raise" (*Bradbee v. Christ's Hospital*, 4 M. & G. 714); or that the arbitrator has made his award "under a misapprehension of the terms of the reference" (*Allenby v. Prondlock*, 4 Dow. 54), or the like. But formerly the generality of the statement in

Stating
grounds of
application.

CHAP. XVII. the rule *nisi* was allowed to be aided by the specific instances pointed out in the affidavits, so that where the rule expressed as the ground of moving that the arbitrator had not decided all matters in difference, and the affidavit whereon the rule was granted specified the particular matters in difference not decided by the arbitrator: it was held that, coupling the affidavit and the rule together, the objections were sufficiently stated. (*Rawsthorn v. Arnold*, 6 B. & C. 629.) So a statement "that the arbitrator had not awarded on a matter in difference submitted to him," as a ground of objection, coupled with an affidavit indicating the matter in difference, was held sufficiently specific. (*Dunn v. Warlters*, 9 M. & W. 293.) The effect of a ground of objection being too general was merely to prevent the party taking advantage of it; it did not hinder him from relying on other grounds of objection which were sufficiently stated. (*Boodle v. Davies*, 3 A. & E. 200; *Gray v. Leaf*, 8 Dow. 654.)

Formerly, in moving to set aside a judgment, entered up in pursuance of an award, for defects apparent on the face of the award, the objections need not have been stated in the rule to show cause. (*Manser v. Heaver*, 3 B. & Ad. 295.)

Evidence in
support of
application.

The evidence in support of the application consists of the submission, the affidavits on which the motion is founded, and also a copy of the award (*Sherry v. Oke*, 3 Dow. 349; *Barton v. Ransom*, 5 Dow. 597), unless the award is void for matters extrinsic. Where the motion was on the ground that two arbitrators had made the award without the knowledge of the third the court held that the party was not bound to take up a useless award, which he was seeking to set aside. (*Hinton v. Meade*, 24 L. J., Ex. 140.)

The affidavits.

If the objections appear on the face of the award no other affidavit than that of the due execution of the

award will be required. It is not necessary that there should be an affidavit by one of the attesting witnesses to the award, of its execution. (*England v. Davison*, 9 Dow. 1052.) An affidavit verifying a copy of the award to be a true copy, need not state that the copy has been compared with the original award. (*Hawkyard v. Stocks*, 2 D. & L. 936.) And, an affidavit has been held sufficient which stated, that the paper writing produced was delivered personally into the hands of the deponent as a copy of the award. (*Lund v. Hudson*, 1 D. & L. 236.) And the same was held where the affidavit stated that the paper writing annexed was, or contained, as deponent believed, a true copy of the award, deponent having been served with the same by the attorney for the other side. (*Hayward v. Phillips*, 6 A. & E. 119.) If the award omit matters, the affidavit should set forth such matters, and allege that they were discussed before the arbitrator. (*Hancock v. Reed*, 15 Jur. 1036.) And so, in every other case where the motion is made upon an objection not disclosed by the award, the facts necessary to impeach the award must be fully set forth in the affidavits.

As to the right of the opposite party to inspect documents referred to in an affidavit sworn, but not filed, in an application to set aside an award, see *Re Fenner and Lord* [1897] 1 Q. B. 667 ; 45 W. R. 486.

The courts always construe awards, and hear motions respecting them, with a desire to sustain the judgment of the tribunal the parties themselves have selected (*Re Templeman and Reed*, 9 Dow. 966), at the same time construing the awards according to the rules of common sense and the fair import of the language. (*Stoneheuer v. Farrer*, 14 L. J., Q. B. 127, *per Coleridge*, J.)

In opposition to the motion the other party may produce affidavits to deny or explain away the matters of fact alleged as the grounds of motion ; or if the

Courts favour validity.

Evidence in opposition to motion.

CHAP. XVII. imputation be of a defect in law, he may support the sufficiency of the award by argument, so as at least to render it doubtful whether the award be bad, and if he succeed so far the court will not set it aside. (*Cock v. Gent*, 13 M. & W. 364.) Formerly, on showing cause, the arbitrator's notes were not allowed to be referred to (*Doe v. Preston*, 3 D. & L. 768); but the original agreement of reference was. (*Oswald v. Grey*, 24 L. J., Q. B. 69.)

Costs of the motion.

The court has power over the costs of any order (Arbitration Act, 1889, s. 20), and, in general, when the courts dismiss a motion for setting aside an award they will do so with costs (*Snook v. Hellyer*, 2 Chitt. 43); but sometimes they will do so without costs. (*Ware v. Regent's Canal Co.*, 23 L. J., Ex. 145.) Where the defendant put a wrong construction on an award, which induced the plaintiff to move the court to set it aside, the court held that the defendant's construction was untenable, and therefore discharged the plaintiff's rule, and would not give him the costs of the motion. (*Hocken v. Grenfell*, 6 Dow. 250.) When a motion for setting aside an award on a cause is dismissed, and nothing is said about the costs of the motion, they will be costs in the cause. (*Clarke v. Owen*, 2 H. & W. 324.)

Appeal from refusal to set aside.

A motion to set aside is analogous to an application for a new trial, and ought to be in the interlocutory, not the final, list of appeals. (*Re Delagoa Bay Co. and Tancred*, 37 W. R. 578; 61 L. T. 343.)

Second application.

The motion having been dismissed, the court will not ordinarily entertain another application on a suggestion of fresh objections. (*Hellyer v. Snook*, 2 Chitt. 265; *R. v. Great Western Rail. Co.*, 1 D. & L. 874; but see *Sherry v. Oke*, 3 Dow. 349.)

CHAPTER XVIII.

ENFORCING AN AWARD.

SECT. 1.—*By Summons under Arbitration Act, 1889.*

“AN award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.” (Arbitration Act, 1889, s. 12.)

CHAP. XVIII.

Enforced as a judgment.

This applies only to submissions in writing out of court; but by section 16 of the Act the court or a judge shall, as to references under order of the court or a judge, have all the powers by the Act conferred on the court or a judge as to references out of court.

The application to enforce the award may be made, and leave given, on such terms as may be just, to enforce the award at any time, though the time for moving to set it aside has not elapsed. (R. S. C. Order XLII. r. 31 A.)

Application before time to set aside expired.

Although the repealed section 16 of the C. L. P. Act, 1854, is not re-enacted in terms, an order for the delivery of possession of land may be enforced under this section. (And see R. S. C. Order XLII. r. 5.)

Recovery of land.

An application for leave to enforce an award under this section is made by an originating summons before a master in chambers. (R. S. C. Order LIV. r. 4 F.)

Application.

The summons should be intituled “In the matter of an arbitration between A. B. & C. D., And in the matter of the Arbitration Act, 1889.” It should ask for leave to enforce the award dated , in the above arbitration, in the same manner as a judgment or order to the same effect. (*Ex parte Caucasian Trading Corporation*, 74 L. T. 47; [1896] 1 Q. B. 368.)

CHAP. XVIII.

Evidence in support.

The applicant must produce before the master the original award (or a duplicate thereof), together with a copy, both to be verified by affidavit intituled like the summons. (Practice Master's Rules 20, Annual Practice [1897] 1233.)

Service of summons.

The respondent shall not be required to enter an appearance (R. S. C. Order LIV. r. 4 F), but the summons must be served two clear days before the return thereof. (Order LIV. r. 4 E.)

Matters which may be relied on in opposition to the application.

In opposition to the application, the respondent may show such matters, affecting the validity of the award, as could be used in answer to an application for an attachment. But it seems doubtful whether he would be allowed to go into matters *dehors* the award itself. The proper course in such a case is to move to set aside the award. (*Davies v. Pratt*, 25 L. J., C. P. 71.) Where the respondent is taking steps to set aside the award the summons will be ordered to stand over pending the result of such steps.

Former practice.

In the former practice which obtained as to applications under the statute 1 & 2 Vict. c. 110 (*infra*, p. 282), it was almost a sacred rule that, on a motion for a rule to pay money pursuant to an award, no objection could be raised except for matters apparent on the face of the award. (*Woollen v. Bradford*, 33 L. J., Q. B. 129, *per* Crompton, J.) In answer to the motion, the respondent party could rely on any defect apparent upon the face of the award, even although the time limited for setting it aside had elapsed. (*Pedley v. Goddard*, 7 T. R. 73; *Randall v. Randall*, 7 East, 81.) But matters extrinsic, which should have been made the subject of a motion to set aside the award, such as alleged corruption or misconduct of the arbitrator, could not be set up in answer to the application (*Brazier v. Bryant*, 3 Bing. 167; *Holland v. Brooks*, 6 T. R. 161; *McArthur v. Campbell*, 2 A. & E. 52; 4 N. & M. 208), unless to show that no award

had been made, or that two arbitrators had not executed it at the same time (*Wright v. Graham*, 3 Ex. 131; 18 L. J., Ex. 29), or that the arbitrator was acting without authority. (*Great Western Rail. Co. v. Waterford and Limerick Rail. Co.*, 50 L. J., Ch. 513; L. R., 17 Ch. D. 493.) It was even held that the pleadings in a cause referred could not be looked to, though brought before the court by an affidavit identifying them, so as to show the award defective on its face. (*Davies v. Pratt*, 25 L. J., C. P. 71; 17 C. B. 183.) The court would not depart from this rule although the party in whose favour the award had been made, had, subsequently to the award, been committed to take his trial for perjury during the proceedings. (*Woollen v. Bradford*, 33 L. J., Q. B. 129.)

A cross demand, being a matter within the submission, but not brought before the arbitrator, could not be used as an answer to the motion. (*Smith v. Johnson*, 15 East, 213.)

Under the former practice an application for an order in the nature of a judgment to enforce payment of money in pursuance of an award, would in general only be granted when an attachment would have been granted for its non-payment. (*Creswick v. Harrison*, 20 L. J., C. P. 56; 1 L., M. & P. 721; *Laing v. Todd*, 13 C. B. 276; *Tattersall v. Parkinson*, 17 L. J., Ex. 208; 2 Ex. 342; *Graham v. D'Arcy*, 18 L. J., C. P. 61.) If there were any doubt as to the validity of the award on the face of it, it would not be granted. (*Dickenson v. Allsop*, 13 M. & W. 722; *Mackenzie v. Sligo and Shannon Rail. Co.*, 19 L. J., C. P. 142.) Nor, would it be granted, if the party applying were at the same time endeavouring to obtain the benefit of the award by any other legal proceedings. If a person ordered to pay money under an award satisfied the court that he had a *bonâ fide* claim for a cross demand larger than the sum awarded, which he might reasonably hope to support by way of set-off

In what cases
order formerly
granted.

CHAP. XVIII. or counterclaim to an action on the award, the court would not make an order against him to pay the sum awarded. (*Swayne v. White*, 31 L. J., Q. B. 260.) And where by an award the plaintiff was to pay the costs of a chancery suit between himself and the defendant, which costs had not yet been ascertained, a rule was refused to compel the defendant to pay other sums due under the award. (*Lambe v. Jones*, 9 C. B., N. S. 478; 9 W. R. 202.) The solicitor of the successful party, claiming a lien on the sum awarded, could not have an order in his own name, but only in that of his client, unless there were collusion between the parties to defraud him of his lien. (*Dunn v. West*, 20 L. J., C. P. 1; 10 C. B. 420; *Brearey v. Kemp*, 24 L. J., Q. B. 310.)

Award containing no direction to pay.

An order to pay pursuant to an award will be made though there be no direction in the award to pay; the practice in this respect differing from that of attachments. (*Baker v. Cotterill*, 7 D. & L. 20; 18 L. J., Q. B. 345; *Bowen v. Bowen*, 31 L. J., Q. B. 193.)

Order drawn up.

The order is made in the terms of the summons, and must be drawn up.

Enforced as a judgment.

When the order is made and drawn up, it will be enforced in the same manner as a judgment or order to the same effect. For the manner in which judgments are enforced see R. S. C. Order XLII. and Table of Official Requirements on Issuing Execution, No. 24 A. (Annual Practice [1897] p. 1259.) The order, where the award is for a money payment, is an order that a writ of *fi. fa.* may issue. (*Ex parte Caucasian Trading Corporation*, 74 L. T. 47; [1896] 1 Q. B. 368.) The writ of execution issues immediately, except when a time is fixed for payment. (R. S. C. Order XLII. r. 17.) No demand is necessary or service of the order. If a time is fixed for payment the order will be served as directed in R. S. C. Order XLI. r. 5.

Issuing execution.

To obtain the issue of a writ of execution, produce the

original award, also file a duplicate thereof (no fee), at the Writ, &c. Department of the Central Office, together with the order for leave to enforce it. A reference number is given, as for a commencement of proceedings, and the award will be marked with a seal to indicate that execution has been issued on it. All subsequent proceedings should bear the reference number. (Practice Master's Rules 20, Annual Practice [1897] 1233.)

The process issued under an application to enforce an award is "a civil proceeding" within the Bankruptcy Act, 1890, s. 1, and, therefore, a proper basis for bankruptcy proceedings. (*Ex parte Caucasian Trading Corporation* [1896] 1 Q. B. 368.)

Execution under award is a civil proceeding.

An award under the L. C. C. Act, 1845 (*Re Newbold and Metropolitan Rail. Co.*, 14 C. B., N. S. 405), or under the Public Health Act, 1875 (*Re Walker*, 50 L. T. 207), cannot be enforced under section 12 of the Arbitration Act, 1889, but only by action, when the basis of the assessment or the title to the compensation is in dispute. Nor can an award under section 150 of the Public Health Act, 1875, be enforced under this section. (*Re Willesden Local Board and Wright* [1896] 2 Q. B. 412; 75 L. T. 13.)

Award under compensation Acts.

SECT. 2.—*By Attachment.*

To appreciate the rules upon which the courts act in granting an attachment to enforce an award, it is necessary to consider the gradual development of the jurisdiction.

Origin of attachment.

The only method which formerly existed of enforcing an award summarily was by punishing a party for not performing it, and this practice was only introduced in the reign of Charles II. At that time the practice arose of making the submission a rule of court. This gave the

CHAP. XVIII. court jurisdiction to treat a refusal or wilful neglect of a party to perform an award made under such submission as a contempt of the court, and punishable by attachment. This power was confirmed by 9 & 10 Will. 3, c. 15, s. 1, which, after providing that a submission might be made a rule of court, enacted that, "In case of disobedience to such arbitration or umpirage the party neglecting or refusing to perform or execute the same or any part thereof shall be subjected to all the penalties of contemning a rule of court." [Although this statute is repealed by the Arbitration Act, 1889, section 1 of that Act gives to a submission by consent out of court, the effect of an order of court.] For a long time attachment was the only summary proceeding for compelling obedience to an award, whether the award were for the payment of money or for the performance of some other act. Whenever a submission could be made a rule of court, the performance of the award could be enforced by attachment. But when a submission could not be made a rule of court (as when it was by parol, or by agreement negating its being so made), an attachment for non-performance could not be granted.

Order to pay
under 1 & 2
Vict. c. 110,
s. 18.

But attachment was a remedy against the person only; and previously to the statute 1 & 2 Vict. c. 110 the courts had no power to give a remedy against the property of the defaulting party. (*Neale v. Postlethwayte*, 10 L. J., Q. B. 134; *Doe v. Amey*, 8 M. & W. 565.) To remedy this 1 & 2 Vict. c. 110, s. 18, enacted "That all decrees and orders of courts of equity, and all the rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any

such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act ; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by the courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy ; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.”

This power was extended by R. S. C. Order XLII. r. 24, which provides that “every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.”

The Act has, however, been rendered obsolete by the Arbitration Act, 1889, s. 12 ; though some of the decisions under it are retained by way of guide to the practice under the later Act. (*Ante*, p. 278.)

Proceedings by way of attachment are now seldom resorted to, to enforce an award, being too indirect a remedy. The more direct, speedy, and inexpensive method of obtaining an order under section 12 of the Arbitration Act, 1889, is usually adopted. It is still necessary, however, to consider the decisions as to attachment, since, there are cases, in which disobedience to the award makes it necessary to resort to this remedy.

An attachment may be granted for non-payment of costs awarded. (But see *Grundy v. Wilson*, 7 Taunt. 700.) Where one party has paid the whole of the costs of an award, which were payable partly by the opposite side, to get the award from the arbitrator, the courts may grant an attachment at the instance of the party who has paid the costs against the other party for not con-

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Attachment seldom resorted to.

In what cases an attachment granted.

CHAP. XVIII. tributing his share of such costs. (*Hicks v. Richardson*, 1 B. & P. 93; *Stokes v. Lewis*, 2 Smith, 12.) The payment of interest accruing due after the date of the award cannot be enforced by attachment, but only by action. (*Churcher v. Stringer*, 2 B. & Ad. 777.) Where a party has done all in his power to obey the award, the court will not grant an attachment against him. (*Doddington v. Bailward*, 7 Scott, 733; 7 Dow. 640.) Nor will they do so if it be doubtful whether the award is a good one (*Tattersall v. Parkinson*, 2 Exch. 342; 17 L. J., Ex. 208); or if a set-off has arisen since the award (*Rees v. Rees*, 25 L. J., Q. B. 352); or where there has not been a performance, or tender of performance, of all conditions precedent, or concurrent acts, awarded to be done by the party applying for the attachment. (*Standley v. Hemmington*, 6 Taunt. 561.) So, an attachment will be refused after a long delay, say, four years, unless such delay is satisfactorily accounted for. (*Storey v. Garrey*, 8 Dow. 299; but see *Baily v. Curling*, 20 L. J., Q. B. 235.)

Discretionary. It is perfectly discretionary with the courts, in all cases, whether or not they will grant an attachment for the non-performance of an award, or leave the applicant to his remedy by action. (*Stork v. De Smeth*, Hardw. 106.) An attachment will not be granted unless the award contain a distinct order to do the act, the omission of which forms the ground of the application. (*Graham v. D'Arcy*, 6 C. B. 537; 18 L. J., C. P. 61.) Therefore, where an arbitrator finds by his award that a certain sum is due from the one party to the other, but gives no express order for the payment of that sum, an attachment will be refused for non-payment. (*Seaward v. Howey*, 7 Dow. 318.) Ordering a verdict to be entered for a certain sum, when the arbitrator has no authority to do so, cannot be treated as an order to pay that sum, so as to support an attachment. (*Doulan v. Brett*, 4 N. & M. 854; 2 A. & E. 344.)

No attachment unless the award is distinctly imperative.

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If an award be bad, and the defects are apparent on the face of it, the court will not grant an attachment. Even if it be doubtful whether the award be good or not, the court will not go into the question on an application for an attachment, but will leave the party to his action to enforce performance of the award. (*Cargay v. Aitchison*, 2 D. & R. 222; *Perry v. Nicholson*, 1 Burr. 278; *Jackson v. Clarke*, M'Cl. & Y. 200.) Thus, where the defendant was described by a wrong christian name, in an award directing him to pay a sum of money, the court refused to grant an attachment. (*Davies v. Pratt*, 16 C. B. 586; *Lees v. Hartley*, 8 Dow. 883.) And, where the parties agreed to abide by the award made by the "two arbitrators and their umpire," and the award was made by the two arbitrators only, the objection being taken that all three ought to have executed it, the court considered the point too doubtful to grant an attachment. (*Hetherington v. Robinson*, 4 M. & W. 608; 7 Dow. 192.)

Nor when the award is bad or doubtful.

An attachment will not be granted for not making a payment on a Sunday. (*Hobdell v. Miller*, 2 Scott, N. R. 163.)

In one case, under peculiar circumstances, the court made a rule absolute for an attachment for non-payment of a sum awarded to the wife of one of the parties, although by collusion, payment of the sum had been made to her husband. (*Wynne v. Wynne*, 3 Scott, N. R. 442; 1 Dow., N. S. 723.)

The court will not grant an attachment pending an application for setting aside the award. (*Dalling v. Matchett*, Willes, 215.) And, as the courts will not permit separate contemporaneous proceedings for the same matter, an attachment will not be granted pending an action on the award. (*Badley v. Loveday*, 1 B. & P. 81.) If the party was not in contempt at the time the action was brought—for example, if no demand was made until after that time—the application will be dismissed

No attachment pending contemporaneous proceedings.

CHAP. XVIII. with costs. (*Baker v. Wells*, 9 Dow. 323; *Higgins v. Willes*, 3 M. & R. 382.) But, if he was in contempt at that time, an attachment may be granted on the terms of discontinuing the action and paying the costs. (*Paull v. Paull*, 2 Dow. 340.) But both proceedings will not be permitted; and where a party obtained an attachment to enforce an award, and afterwards proceeded by action, the court set aside the attachment upon the terms of the defendant giving a bond to the plaintiff with sureties to the master's satisfaction, and conditioned to the same effect as in the case of a recognizance of bail. (*Lonsdale v. Whinnay*, 3 Dow. 263.) The courts, however, have granted an attachment pending a foreign attachment in the City of London Court upon the same award. (*Coppell v. Smith*, 4 T. R. 313, n.)

Imprisonment under an attachment is no satisfaction of the award, and the party remains liable to an action upon it, at least, where his refusal to perform the award is wilful. (*R. v. Hemsworth*, 3 C. B. 745.)

In whose
favour an at-
tachment lies.

An attachment will not be granted in favour of a person not a party to the reference, but to whom money is by the award ordered to be paid. (*Re Skeete*, 7 Dow. 618; *Dunn v. West*, 10 C. B. 420; 20 L. J., C. P. 1.) Nor, even on behalf of an executor or administrator of a party who has died after the award was made, and to whom the money awarded was to have been paid (*R. v. Maffey*, 1 Dow. 538; except, perhaps, where the award directs the money to be paid to the party or his executors. (*Rogers v. Stanton*, 7 Taunt. 576.)

Who liable to
be attached.

An attachment will not be granted against a peer (*Walker v. Earl Grosvenor*, 7 T. R. 171) or a member of the House of Commons (*Catmur v. Knatchbull*, *ib.* 448); nor against the executor or administrator of the party by whom the money was to be paid or the act done. (*Newton v. Walker*, Willes, 315; and see *Lewin v. Holbrook*, 11 M. & W. 110.) But, where an executor or

administrator submits disputes in that character to arbitration, he will be liable to an attachment for non-performance of the award. (*Spiry v. Webster*, 2 Dow. 46; *Re Joseph and Webster*, 1 R. & M. 496.) The court will not grant an attachment against a party to an action which was referred without his consent, and who did not authorize the action or the reference, and had no notice of it until after the award. (*Robertson v. Hatton*, 26 L. J., Ex. 293.) Nor would an attachment formerly lie against a corporation, or against its individual members, for the non-performance of an award. (*Guilford v. Mills*, 2 Keb. 1; *Mackenzie v. Sligo and Shannon Rail. Co.*, 9 C. B. 250; 19 L. J., C. P. 142; *London v. Lynn*, 1 W. Bl. 205; but now see R. S. C. Order XLII. r. 31.) Where a public company was authorized by statute to sue and be sued in the name of their treasurer, who was not to be liable in his person or goods by reason of his being defendant, the treasurer, being party to an action which was referred, was directed by the award to pay a sum of money, the court directed a mandamus to the treasurer and directors of the company, to pay the money so awarded. (*R. v. St. Katharine Dock Co.*, 4 B. & Ad. 360.) It was also held, in the same case, that as the defendant was not rendered personally liable by the Act of Parliament, an attachment could not issue against him for non-payment of the money awarded. (*Corpe v. Glyn*, 3 B. & Ad. 801.) Where a *feme sole*, having agreed to a reference, was awarded to deliver up two notes and pay a sum of money; she married, and the husband refusing to pay: it was doubted if the court could grant an attachment against both or either of them. (*Anon.*, 1 Crompt. 270. 3rd ed.) But an attachment will be granted against one of several of the parties against whom the award is made (*Richmond v. Parkinson*, 3 Dow. 703); or against a party residing out of the jurisdiction of the court. (*Hopcraft v. Fermor*, 1 Bing. 378; 8 Moore, 424.)

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Corporation.

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Steps preliminary to attachment.

Personal service of award, &c. necessary.

Proceedings by attachment, being by way of punishment for contempt of the order of the court, the applicant, before going to the court, must be prepared to show that the delinquent party has wilfully refused to obey the award with notice of his obligation. Therefore a copy—which must be a correct one—of the award, must be personally served upon the party who has to perform the award. (*Thomas v. Rawlings*, 28 L. J., Ex. 347.) Where the matter to be performed is the payment of costs which have been taxed, a copy of the master's allocatur must be served at the same time. (*Bass v. Maitland*, 8 Moore, 44.) When the demand of performance of the award is made by an agent, a copy of the power of attorney must also be served. Tendering the documents, and leaving them with the party, is sufficient service, though he refuse to take them up. (*Ellis v. Giles*, 5 Dow. 255.) He must also, at the time of service of the copies, be shown the originals, in such a way that he can read the contents, though they need not be placed in his hands (*Calvert v. Redfearn*, 2 Dow. 505); and this whether a sight of them be demanded or not. (2 Lush's Pr. 1065.) Serving a copy of an award one day, and showing the original two days after, when the demand was made for performance, has been held insufficient. (*Lloyd v. Harris*, 8 C. B. 63; 18 L. J., C. P. 346.) Where the arbitrators have enlarged the original time given them for making their award, a notice of such fact, and that the award was made within the enlarged time, should also be given to the party who has to perform the award. (*Davis v. Vass*, 15 East, 97; *Doddington v. Bailward*, 7 Dow. 640; 7 Scott, 733.) Service of the original submission is not necessary. (*Greenwood v. Dyer*, 5 Dow. 255.)

When personal service dispensed with.

No order for attachment will in general be made without personal service, in any case where the party applying has another remedy, and this although the

other party purposely avoid the service. (*Richmond v. Parkinson*, 3 Dow. 703.) But where it appeared that the party had personal knowledge of the award, from a former service of the same award, the Court of Queen's Bench granted an attachment. (*Re Bower*, 1 B. & C. 264.) But personal service can only be dispensed with when it appears that the party is evading service. (*Thomas v. Rawlings*, 28 L. J., Ex. 347.) Service on his solicitor is not sufficient without showing that every effort had been made to effect personal service. (*Evans v. Prosser*, 34 L. J., Q. B. 256.) The court will not infer personal service to bring the party into contempt: thus, where it appeared that the service was made at the defendant's house, and the servant with the rule and award went upstairs, and returned with an answer that the defendant's attorney would be there on the following day, and would give an answer, it also appeared that the defendant was confined to his bed with the gout, the court refused an attachment, observing that they could not infer from these circumstances that the rule and award had come to the defendant's hands. (*Brander v. Penleaze*, 5 Taunt. 813.) If an award be against two, and one of them be personally served, but a personal service on the other be found impracticable, the court will make an order against the one served. (*Richmond v. Parkinson*, 3 Dow. 703.)

To obtain an order for an attachment the person in whose favour the award is made should, at or after the time of serving the copies of the award and other documents as above mentioned, make an express oral demand of performance of the award. (*Lloyd v. Harris*, 7 D. & L. 118; 18 L. J., C. P. 346; *Swinfen v. Swinfen*, 25 L. J., C. P. 303; 18 C. B. 485.) The fact that a particular time and place are fixed by the award for the performance does not dispense with the necessity of a personal demand. (*Brandon v. Brandon*, 1 B. & P. 394.) But it is not necessary the demand should be at the time fixed for

Oral demand
of perform-
ance neces-
sary.

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performance. (*Re Craike*, 7 Dow. 603.) On the other hand it cannot be made until the time has fully expired. And, where a deed to be prepared by the one party, is to be executed by the other, on a certain day, it must be tendered on that day. (*Doe v. Howell*, 5 Ex. 299; 19 L. J., Ex. 232.) A demand made by one of several plaintiffs, of money payable under an award, is sufficient. (*Drew v. Woolcock*, 24 L. J., Q. B. 22; *Baily v. Curling*, 20 L. J., Q. B. 235.) But, where an award ordered a bond to be delivered to three plaintiffs, a demand by the three, or under a power of attorney from all, was held necessary. (*Sykes v. Haigh*, 4 Dow. 114.) It has been held that a personal demand of money payable under an award, with a view to a proceeding on a rule of court, may be dispensed with where the party is evidently keeping out of the way to avoid the demand. (*Smith v. Troup*, 7 C. B. 757; 18 L. J., C. P. 209.)

Demand by
agent or at-
torney.

When it is impossible or inconvenient for the party to make the demand personally, he may depute his agent, duly authorized by a power of attorney, to do so. A mere parol authority to demand performance of the award is not sufficient. It is also necessary that a copy of the power of attorney be left with the party upon whom the demand is made. (*Laugher v. Laugher*, 1 Dow. 284; *Ex parte Fortescue*, 2 Dow. 448; *King v. Packwood*, 2 Dow. 570; *Hartley v. Barlow*, 1 Chitt. 229.) Where costs are awarded, a demand by the solicitor of the party is by virtue of his character sufficient, without a power of attorney. (*Inman v. Hill*, 4 M. & W. 7; *Mason v. Whitehouse*, 4 Bing. N. C. 692.) So, a solicitor may demand a sum expressly awarded to be paid to the plaintiff or his solicitor. (*Hare v. Fleay*, 20 L. J., C. P. 249.) A power of attorney is not necessary to enable an agent to demand the execution of a deed directed by an award. (*Kenyon v. Grayson*, 2 Smith, 61; *Tebbutt v. Ambler*, 2 Dow., N. S. 677.)

The precise thing or sum awarded must be demanded, otherwise there can be no attachment for refusal. (*Strutt v. Rogers*, 7 Taunt. 214.) If part of the award is void, the demand should be confined accordingly. Thus, where two sums are directed to be paid, one of which the arbitrator has no power to award, if both sums are demanded an order will not be made for either, but, if the demand be for the sum only which is well awarded, the court will grant an attachment for that sum. (*Poynor v. Hatton*, 7 M. & W. 211; *Re Cardigan and Henderson*, 22 L. J., Q. B. 83; *Whitehead v. Firth*, 12 East, 165; *Tattersall v. Parkinson*, 2 Ex. 342; 17 L. J., Ex. 208.) Where an award, upon a submission of all matters in difference between partners, directed the delivery up of a particular box, which was a matter not specifically referred to the arbitrator, and which had been parted with before the date of the submission, it was held that an attachment could not be granted for non-performance of that part of the award. (*Smith v. Reeves*, 2 H. & W. 306.)

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Demand must be of the precise matter awarded, or of so much as is well awarded.

Where an award directed that the plaintiff should, on a given day, deliver up to the defendant a warrant for a hogshead of port wine lying in the London Docks, describing it by its number and marks, and the demand required the plaintiff to deliver up one hogshead of port wine, describing it, it was held that this was not a sufficient demand to support an attachment. (*Hemsworth v. Brian*, 1 C. B. 131.)

No writ of attachment shall issue without the leave of the court or a judge, to be applied for on notice to the party against whom the attachment is to be issued. (R. S. C. Order XLIV. r. 2.)

Application for attachment.

In the Queen's Bench Division the application for an attachment may be made to a judge at chambers on summons duly served on the other side (*Salm Kyrbury v. Posnanski*, 13 Q. B. D. 218; 53 L. J., Q. B. 428;

Mode of application—summons.

CHAP. XVIII. and see *Amstell v. Lesser*, 16 Q. B. D. 187; but in *Davis v. Galmoye* (39 Ch. D. 322; 58 L. J., Ch. 120) the Court of Appeal thought the application ought to be made by motion in open court, though it is not necessarily so made. (*Ib.*, 40 Ch. D. 355; 58 L. J., Ch. 338.) The application is supported by the same evidence as that hereinafter pointed out as necessary upon a motion in open court. The judge, if satisfied that the applicant has established his right, may give leave to issue a writ of attachment. In all cases, however, a party has the right to apply for an attachment in open court.

Motion.

Formerly, the application in open court in the Queen's Bench Division for an attachment, was by moving for a rule *nisi*, and afterwards making it *absolute*; in the Chancery Division it was by motion upon notice to the other side. Now, the practice in both divisions is the same. No motion or application for a rule *nisi* or order to show cause shall hereafter be made to enforce an award or for attachment. (R. S. C. Order LII. r. 2.) Notice of motion must be given to the parties affected thereby (Order LII. r. 3); and every such notice shall state in general terms the grounds of the application, and a copy of any affidavit intended to be used shall be served with the notice of the motion. (Order LII. r. 4.)

Evidence in support.

An application for attachment will, in all cases, require to be supported by affidavit. The notice of motion and affidavit will be entitled in the action, when there is one in court. If there is no action depending, they will be entitled, "In the High Court of Justice. ——— Division. In the matter of an arbitration between A. B. and C. D." The affidavit must verify the award, and show that it was made in time (*Wohlenberg v. Lageman*, 6 Taunt. 251; *Higgins v. Street*, 25 L. J., Ex. 285); and the original award is usually exhibited. When the time has been enlarged, the affidavit must show that it was

regularly enlarged, and that the defendant had notice of the enlargements, and that the award was made within the enlarged time. (*Davis v. Vass*, 15 East, 97.) But where the time was enlarged by an arbitrator, under a power given to him in the order of reference, and the order and enlargement were made a rule of court, it was held not to be necessary in moving for an attachment to verify the affidavit that the time was duly enlarged. (*Dickins v. Jarvis*, 5 B. & C. 528). There must also be an affidavit showing that all the proper steps preliminary to the order being made—such as personal service of the necessary documents, and a proper demand, and refusal or neglect to perform the award—have been taken. When the demand has been made by an agent under a power of attorney, there must be an affidavit of the due execution of the power of attorney. (*Laugher v. Laugher*, 1 Dow. 284.) It must also appear by affidavit, that the party applying has performed, or offered to perform, all conditions precedent directed by the award. (*Standley v. Hemmington*, 6 Taunt. 561.) The affidavit should also show that the award remains unperformed, and the money (if awarded), unpaid. (See *Gifford v. Gifford*, Forrest, 80.)

When the original award is lost, an affidavit verifying a true copy of the award, and deposing that the original is lost, is sufficient to induce the court to grant an attachment. (*Robinson v. Davis*, 1 Str. 526; *Hill v. Townsend*, 3 Taunt. 45.)

In opposition to the motion, the respondent may rely upon any irregularity in the demand or service of documents, as well as upon any of the other grounds upon which an attachment is refused. (*Ante*, p. 284.)

If the affidavits used in moving are defective, a second application, on amended affidavits, is seldom allowed (*Re Butler*, 13 Q. B. 341); and though the court on objections purely technical will dismiss the motion without costs,

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Lost award.

Matters in opposition to the motion.

Second application.

CHAP. XVIII. the party opposing the motion may, after taking the objection, be allowed, without waiving his advantage, to enter into the merits, so as to ask that the motion be dismissed with costs. (*Re Chamberlain*, 8 Dow. 686.)

SECT. 3.—*By Judgment and Execution in the Action Referred.*

Award directing judgment.

Where an action is referred to an arbitrator for trial, the common order of reference enables the party in whose favour the award is made, sometimes, at the expiration of a given time after service of the award, to sign final judgment in accordance with the award.

Power of arbitrator to direct.

Whether the order of reference contains such a provision or not, the arbitrator, when the action only is referred, has power to direct judgment to be entered. (R. S. C. Order XXXVI. rr. 50 and 55*c.*) His award is equivalent to the verdict of a jury. (Arbitration Act, 1889, s. 15 (2).) It is therefore his duty by his award to give some direction as to the judgment to be entered. (Order XL. r. 2.) If he omit to do so in his award, he may do so by a supplemental direction as to judgment; or application may be made to a judge in chambers.

Requirements for judgment.

The "official requirements" in the Queen's Bench Division, for judgment on the award (see Annual Practice [1897] 1245, No. 28), are (1) production of the original award or a duplicate thereof, which need not be filed unless the parties desire it; (2) the order of reference and a copy of the pleadings are to be filed, and (3) also an affidavit of service of the award, if the time for signing judgment dates from the service of the award. No demand of performance of the award is necessary before signing judgment.

Judgment when verdict taken.

When a verdict is taken at the trial subject to a reference, the party in whose favour the award or certificate

is given, is entitled to sign judgment forthwith. (*O'Toole v. Pott*, 26 L. J., Q. B. 88; 7 E. & B. 102; *Cromer v. Churt*, 15 M. & W. 310.) And the leave of the court or a judge is not necessary. (*Lloyd v. Lewis*, 2 Ex. D. 7; 46 L. J., Ex. 81.)

Judgment being entered up, the writ of execution will issue forthwith. Execution.

A certain day being fixed in the award for the payment of money, although judgment may be entered, yet, if execution be taken out before that day, the court will set it aside for irregularity. (*Callard v. Paterson*, 4 Taunt. 319.) Formerly, execution could only issue for the sum awarded, and not for interest accrued thereon. (*Lee v. Lingard*, 1 East, 400.) But now, under R. S. C. Order XLII. r. 16, a writ of execution for the recovery of money may be indorsed with a direction to the sheriff to levy for the amount due, with interest after the rate of £4 per cent. from the entry of the judgment. For interest on sum awarded.



SECT. 4.—*By Action for a Money Claim.*

In all cases the performance of an award may be enforced by action, whether the submission be by deed, by writing not under seal, or by parol, or by order of court. In what cases an action will lie.

In some cases it is the only remedy. Thus, where the submission is not in writing, and has not the effect of an order of court, an action is the only remedy at law for enforcing the award. So, when the validity of the award is doubtful, or on grounds hereinbefore considered (sect. 1), the court will refuse to enforce the award by summons, the party in whose favour it is made will be left to his remedy by action (*Creswick v. Harrison*, 20 L. J., C. P. 56), thus leaving the party resisting obedience to the award, to raise any defence he may have, either by

CHAP. XVIII. way of objection to the award itself, or by way of set-off or counterclaim. An award under the L. C. C. Act, 1845, or the Public Health Act, 1875, can, in case the claimant's title is disputed, only be enforced by action. (*Re Walker*, 50 L. T. 207.)

An action may be maintained against the party liable to perform the award, at the same time that he is imprisoned for non-performance. (*R. v. Hemsworth*, 3 C. B. 745.)

Interest.

Where money is awarded to be paid at a particular time and place, if duly demanded there on the day, interest from that day, together with the principal, may be recovered in an action on the award. (*Pinhorn v. Tuckington*, 3 Camp. 468.) So, where no particular time is mentioned, interest runs from the time of demand. (*Johnson v. Durant*, 4 C. & P. 327.)

Costs, to be taxed before action for.

When the award gives the costs of the reference, but does not fix the amount, they need not be taxed before an action is commenced to recover them, but they ought to be taxed before trial. (*Holdsworth v. Wilson*, 32 L. J., Q. B. 289; 3 B. & S. 1; *Sharpe v. Metropolitan District Rail. Co.*, 4 Q. B. D. 645; 5 App. Cas. 425; 50 L. J., Q. B. 14.) When the costs of the award, paid to the arbitrator, are alone sought to be recovered from the defendant, and there is no suggestion that they are excessive, they need not be taxed. (*Threlfall v. Fanshawe*, 19 L. J., Q. B. 334.)

Action is on the contract of the parties.

The remedy of the plaintiff is upon the contract contained in the submission, which is treated as an agreement to pay such sum, or do or submit to such acts, as shall be determined by the arbitrator. (*Purslow v. Baily*, 2 Ld. Raym. 1040; *Ferrer v. Oven*, 7 B. & C. 427; 2 Saund. 61 h.) The award supplies the terms left uncertain by the submission, and the two together form a complete contract. (*Wood v. Griffith*, 1 Swanst. 54; *Nickels v. Hancock*, 7 De G., M. & G. 318.) The nature

of the contract and the liability of the parties are determined by the submission. (*Ante*, p. 46; *Walters v. Morgan*, 2 Cox, 369.) The extent of the liability is defined by the award, so far as it is consistent with the submission. CHAR. XVIII.

The plaintiff may either claim the amount awarded as the sum contracted to be paid, in which case the writ, unless specially indorsed, may be indorsed "The plaintiff's claim is £ for money payable under an award" (R. S. C. App. A., pt. 3, s. 2), or he may claim damages for breach of the contract to observe the award, in which case the appropriate indorsement will be, "The plaintiff's claim is for damages for non-compliance with the award of X. Y." (App. A., pt. 3, s. 4.) Indorsement
of writ.

The material facts to be alleged in the statement of claim are (1) that the parties entered into a mutual submission to the award of a third person (1 Saund. 61 h); and (2) that such third person has made his award for the amount claimed. When damages are claimed, the particulars of special damage should be set out. Neither the submission or award need be set out in the claim, but it should state whether the submission is in writing or by parol, or the result of a series of documents. (See *Turquand v. Fearon*, 48 L. J., Q. B. 703.) Statement of
claim.

It is submitted that under section 24 of the Judicature Act, 1873, every objection to an award, other than objections founded on the misconduct of the arbitrator, which have been recognized as grounds for relief in equity, would now be available as a defence to an action on the award. Defence.

If the award be bad, and so appear on the face of the claim, the defendant could formerly demur (*Fisher v. Pimbley*, 11 East, 188; *Sim v. Edmonds*, 23 L. J., C. P. 229); and may now raise the point under R. S. C. Order XXV. r. 2. Demurrer.

The defendant may plead that no such award has No award.

CHAP. XVIII. been made by the arbitrator of and concerning the matters referred to him as alleged. Under this defence the defendant may show that no valid award was made (*Dresser v. Stansfield*, 14 M. & W. 822); as that joint arbitrators did not execute the award together (*Wade v. Dowling*, 23 L. J., Q. B. 302; 4 E. & B. 44); or that the award was not made within the time prescribed by the submission, or did not determine all the matters in dispute which were notified to the arbitrator. (*Mitchell v. Staveley*, 16 East, 58; *Dresser v. Stansfield*, *supra*; *Roberts v. Eberhardt*, 27 L. J., C. P. 70; 3 C. B., N. S. 482.) It seems that such a plea does not put in issue the validity of the award in respect of matters not appearing on the face of the statement of claim (*Adcock v. Wood*, 6 Ex. 814; 20 L. J., Ex. 435); or entitle the defendant to show that the award has been set aside (*Roper v. Levy*, 7 Ex. 55; 21 L. J., Ex. 28); or is invalid by reason of the misconduct of the arbitrator. (*Whitmore v. Smith*, 31 L. J., Ex. 107; 7 H. & N. 509.)

Misconduct of
the arbitrator.

Formerly, in a common law action the corruption or other misconduct of the arbitrator in making his award, not appearing on the face of the award, could not be pleaded: the party's only remedy in such a case was by bill in equity, or by motion to set aside the award. (*Whitmore v. Smith*, 31 L. J., Ex. 107; 7 H. & N. 509; *Braddick v. Thompson*, 8 East, 344; *Thorburn v. Barnes*, 36 L. J., C. P. 184; L. R., 2 C. P. 384.) In Chancery, however, the misconduct of the arbitrator might be set up in answer to a bill to enforce the award (*Eads v. Williams*, 4 De G., M. & G. 674), or a bill might have been brought to set aside the award for misconduct of the arbitrator (*Lingood v. Eade*, 2 Atk. 501; *Medcalfe v. Ives*, 1 Atk. 63), notwithstanding the time for applying to set aside the award by motion had expired. It would seem, however, that the rule at law still prevails, and that misconduct of the arbitrator may not be pleaded to

an action on the award. (*Bache v. Billingham* [1894] 1 Q. B. 107, 112; 63 L. J., M. C. 1.) And, even if such a defence were permissible, the defendant would be held in the majority of cases to have lost his equity to relief by not applying in time to set aside the award by motion. (See *Smith v. Whitmore*, 33 L. J., Ch. 713; 2 De G. J. & S. 297; *Eads v. Williams*, 4 De G., M. & G. 674.)

The defendant may plead that, as to the whole or part of a sum awarded, it was so awarded in excess of the jurisdiction of the arbitrator. (*Buccleuch v. Metropolitan Board of Works*, L. R., 3 Ex. 307; 5 Ex. 221; 5 H. L. 418; 39 L. J., Ex. 131; 41 *ib.* 137.) So, if on any other ground the award is in excess of the submission the defence must be specifically raised. (See *King v. Bowen*, 8 M. & W. 625; *Great Western Rail. Co. v. Waterford and Limerick Rail. Co.*, 50 L. J., Ch. 513.)

The plaintiff is not bound, as formerly (*Birks v. Trippet*, 1 Saund. 32), to allege the performance of conditions precedent to his right to sue. Therefore if the defendant intends to rely upon the non-performance of any condition precedent he must specify the same distinctly in his defence. (R. S. C. Order XIX. r. 14.)

Where an award is good as to part only, the defendant may limit his defence to the part of the award which is bad, and as to such part plead specifically the material facts upon which he relies to show that it is not binding, as being in excess of the submission, or the like.

In addition to any defence the defendant may have to the award, he may plead a set-off or counterclaim.

SECT 5.—*By Action for Specific Performance.*

The court will order specific performance of an award, in all cases where the thing directed to be performed is such as would be enforced, if the same were by

CHAP. XVIII.

Excess of jurisdiction.

Non-performance of conditions precedent.

Defence as to part.

Set-off and counterclaim.

When action will lie.

CHAP. XVIII. agreement between the parties. Thus, an action will lie for specific performance where anything is awarded to be done in specie, as the conveyance of land or the like (*Hall v. Hardy*, 3 P. Wms. 190; *Wood v. Griffith*, 1 Swanst. 54), unless there be uncertainty in the award. (*Hopcraft v. Hickman*, 2 S. & S. 130.) But to compel the execution of an award for the payment of money, the proper remedy is either by summons or action on the money claim. (3 P. Wms. 190, n.)

Part perform-
ance.

There are cases in which the court has specifically enforced an award not binding in form of law (*Norton v. Mascall*, 2 Vern. 24); but to warrant interference in such a case there must have been assent or part performance, and in *Blundell v. Brettargh* (17 Ves. 232) Lord Eldon said he had met with no authority for the specific performance of an award by arbitrators, appointed for the valuation of interests, where their acts, for the purpose of carrying into effect the agreement for an award, were not valid in law, as to time, manner, or other circumstances, unless in the cases of acquiescence or part performance; and accordingly, in the case before him, refused specific performance of an agreement to sell at a valuation, which, on the construction of the agreement, the court held was to be made during the lives of the parties, one of them having died before the award was made.

Performance
of an award
enforced as of
a contract.

The interference of the court to compel specific performance is in exercise of its ordinary jurisdiction as applied to agreements, and not of any jurisdiction peculiar to awards; it follows that many, if not all the principles applicable to ordinary actions of that nature must apply. (*Nickels v. Hancock*, 7 De G., M. & G. 314; Fry on Specific Performance, 699.) Where, therefore, the agreement contained in the submission is such in its character as, whether from its unreasonableness, unfairness, or imprudence, the court would not specifically

enforce, this will prevent its interference in respect of the award founded on it. Nor can the court interfere where the award is excessive or defective—not if it be excessive, for, so far as the arbitrator has gone beyond his authority, there is no binding agreement between the parties; not if it be defective, because the parties had agreed to be bound by his decision on the whole, and not on part, of the matters submitted to him. (*Nickels v. Hancock*, 7 De G., M. & G. 300.) And although an award on part of the matters referred may be good, the court will not enforce it unless it dispose of all matters referred. (*Hide v. Pettit*, 1 Ch. Ca. 185.)

The court will not generally take into consideration the reasonableness of an award in reply to an application for specific performance; for, the arbitrators being judges of the parties' own choosing, it has been held that the award cannot be objected to by either of the parties on the ground of its unreasonableness. (*Medcalfe v. Ives*, 1 Atk. 64.) Thus in *Wood v. Griffith* (1 Swanst. 43) the court enforced specific performance of an award which ordered the sale of an estate under circumstances which greatly depreciated its value. But the rule that the court will not consider the reasonableness of an award cannot be laid down as a universal one. (*Parken v. Whitby*, T. & R. 366; *Nickels v. Hancock*, 7 De G., M. & G. 300, 315.) The court will not grant specific performance unless it can give full relief to both parties. (*Blackett v. Bates*, L. R., 1 Ch. 117; 35 L. J., Ch. 324.)

It seems that, even if an award be one of which specific performance might be enforced, a party could not, after having taken ineffectual proceedings to set it aside, enforce specific performance. (*Blackett v. Bates*, L. R., 1 Ch. 117.) But in one case it was held no ground for refusing a decree for specific performance, that the Court of King's Bench had granted an attachment against the defendant for non-performance of the award, in

Unreasonable-
ness.

Effect of
other pro-
ceedings.

CHAP. XVIII. refusing to execute an authority to sell an estate, and had discharged the attachment on receiving their officer's report that the defendant had not been guilty of a contempt. (*Wood v. Griffith*, 1 Swanst. 43.)

Illegality and
laches.

The specific performance of an award which directs the doing of illegal acts will not be enforced. (Fry, 226; *Walters v. Morgan*, 2 Cox, 369.) Nor will the court grant specific performance when a long time has elapsed without any attempt to enforce the award. (*Eads v. Williams*, 24 L. J., Ch. 531.)

CHAPTER XIX.

REFERENCES TO OFFICIAL AND SPECIAL REFEREES.

SECT. 1.—*The Position and Powers of Referees Generally.*

THE Arbitration Act, 1889, provides for two kinds of references to official and special referees, viz.:—(1) Reference for inquiry and report (s. 13); (2) Reference for trial (s. 14). We will deal with them separately later. Such references are not references to “arbitration.” (*Munday v. Norton*, 66 L. T. 173; 1892 1 Q. B. 403.)

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References of
two kinds.

Official and special referees perform functions analogous to those of the masters under the C. L. P. Act, 1854, with the addition of such special powers as are conferred on them by statute.

The official referees are permanent officers attached to the Supreme Court, and appointed by the Lord Chancellor.

Official
referees.

A special referee is a person appointed to deal with the particular matter referred. When the reference is for inquiry under the Arbitration Act, 1889, s. 13, he is appointed by the judge or the parties. When the reference is for trial under section 14, he must be agreed upon by the parties. (*London, &c. Insurance Co. v. British America Assurance Co.*, 52 L. T. 385.)

Special
referee.

Official and special referees have the same powers and duties, and proceed in the same manner in all respects, and are to be deemed officers of the court. (Arbitration Act, 1889, s. 15 (1).)

All referees
have same
powers and
duties.

The R. S. C. Order XXXVI. r. 7, enables the court or a judge at any time to order any cause, matter, or issue to

CHAP. XIX. be tried by an official referee or special referee with or without assessors.

Discretionary power to refer not generally controlled.

The discretion of the judge or a court in ordering or refusing a compulsory reference will not generally be interfered with on appeal (*Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 425; *per* Thesiger, L.J.; *Ward v. Pilley*, 49 L. J., Q. B., 705; 5 Q. B. D. 427; *per* Baggallay, L.J.; *Knight v. Coales*, 19 Q. B. D. 296; 56 L. J., Q. B. 486), except where it clearly appears that the discretion has been wrongly exercised and injustice done thereby. (*Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664; 51 L. J., Q. B. 348; 30 W. R. 805; *Case v. Willis*, 8 Times L. R. 610.)

Order of reference should be clear.

An order of reference should point out whether the reference is under section 13, for report, or under section 14, for trial. If it is under section 14 it should say whether the whole action or only certain issues are referred, and if only certain issues, which. (See *Longman v. East*, 38 L. T. 15, *per* Brett, L.J.) The forms given in the rules should be strictly followed. (*Wenlock v. River Dee Co.*; 19 Q. B. D. 155.)

Reference may be at any stage of proceedings.

A reference, either for report or trial, may be directed at any stage of the proceedings. In *Dunkirk Colliery Co. v. Lever* (L. R., 9 Ch. D. 20; 39 L. T. 239) there was a claim by the plaintiffs for damages by reason of the non-performance by the defendants of a contract; at the trial of the action the M. R. held that the plaintiffs were entitled to relief, and ordered that the defendant should pay them their costs of the action, and that it should be referred to a special referee to inquire and report as to damages; and that after he had made his report, such further order should be made by the judge in chambers with respect thereto, and the subsequent costs, as should be just. In *Sykes v. Brook* (W. N. (1880) 187; 29 W. R. 821), the parties having agreed to refer certain questions for inquiry, Fry, J., ordered that the agreed

matters should be referred, and that the action should stand until the report should be made, with liberty to apply.

Upon an appeal against a compulsory order of reference under the C. L. P. Act, 1854, the court varied the order by directing a reference to an official referee. (*Martin v. Pyffe*, 50 L. T. 72.) And where the reversal by the Court of Appeal of a judgment of the court below necessitated the taking of very difficult accounts, the court directed them to go to the official referee instead of to the chief clerk. (*Rochevoucauld v. Boustead* 1897 1 Ch. 196.)

The Lord Chancellor by order 4th February, 1889, directed that all references of causes other than those involving questions of costs or questions of retainer, and all references to assess damage, except those under writ of inquiry, should in future be made to the official referees.

When in the Chancery Division a cause or matter is transferred from one judge to another for trial only, the judge to whom the cause or matter is transferred may direct that any further proceedings therein, before or after the hearing or trial thereof, shall be taken before an official or special referee. (R. S. C. Order XLIX. r. 2.)

An application for reference is usually made by summons, which may be heard in chambers either before a judge, master (Order LIV. r. 12 A), chief clerk, or district registrar, and is generally supported by an affidavit of circumstances rendering the reference desirable.

An appeal from a compulsory order of reference made by a judge sitting at *nisi prius* or assizes must be brought direct to the Court of Appeal. (*Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 425.) An appeal from a like order made by a judge in chambers is to the divisional court. (*Ib.*)

Business referred to the official referees, not naming any one of them in particular, is distributed amongst them in rotation by the clerk to the senior official referee. (R. S. C. Order XXXVI. r. 45.) Upon production to the rota clerk to the official referees, Portugal Street,

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Appeal.

Direction of
Lord Chan-
cellor.

Of transferred
action.

Application
usually by
summons.

Appeal from
order of
reference.

Distribution
of business
amongst official
referees.

CHAP. XIX. Lincoln's Inn Fields, of the order, or a duplicate of it, he will indorse the name of the official referee to whom that business is referred (r. 46).

Reference to particular referee.

The court may refer any business to any one in particular of the referees (Order XXXVI. r. 45), and the parties may agree for a reference to a particular referee. (Arbitration Act, 1889, s. 3.) When the parties are agreed, it is usual to insert the name of the referee in the order. The clerk, in making distribution of the business amongst the official referees, will have regard to such references. (Order XXXVI. r. 47.)

Application to proceed with the reference.

An order of reference being obtained (and in case the reference is to an official referee, the name of the referee in rotation indorsed), the party having the conduct of the reference should apply to the referee to make an appointment for proceeding with the reference.

The appointment, when obtained, must be served upon the other parties to the reference.

Where referee may hold his sitting.

The referee may, subject to the order of the court or a judge, hold the trial at, or adjourn it to, any place which he may deem most convenient, and have any inspection, or view either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. (Order XXXVI. r. 48.) A referee, whether official or special, has power, subject to the control of the court, to give a peremptory appointment for the hearing of the reference, and in default of appearance by either party to proceed in his absence. (*Wenlock v. River Dee Co.*, 53 L. J., Q. B. 208 ; 49 L. T. 617.)

View.

Referee to sit *de die in diem*.

The referee shall, unless otherwise directed by the court or a judge, proceed with the trial *de die in diem* in a similar manner as in actions tried with a jury. (Order XXXVI. r. 48.) This is, however, directory only, and a party acquiescing in non-continuous sittings by the referee cannot afterwards make it an objection to his report. (*Robinson v. Robinson*, 24 W. R. 675 ; 35 L. T. 337.)

Evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by *subpoena*, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge. (Order XXXVI. r. 49; *Wenlock v. River Dee Co.*, 19 Q. B. D. 155; 56 L. J., Q. B. 589.)

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Conduct of
the reference.

The official referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity Sittings of the High Court of Justice, except on Saturdays during such sittings, when they shall sit at least from 10 a.m. to 1 p.m.; but nothing in this rule shall prevent their sitting on any other days. (Order LXIII. r. 16.)

Hours of
sittings of
official
referees.

The referee has the same authority in the conduct of any reference or trial as a judge of the High Court when presiding at any trial before him. (Order XXXVI. r. 50.) This includes power to grant discovery, and to order the production of documents. (*Ib.*) There is concurrent jurisdiction in the judge at chambers and the referee to order inspection, and the application should be made to the referee in the first instance (*Macalpine v. Calder* [1893] 1 Q. B. 545; 62 L. J., Q. B. 607), and an appeal lies from the referee to a judge in chambers. (*Re Leigh*, 4 Ch. D. 661; *Hayward v. Mutual Reserve Association* [1891] 2 Q. B. 236.)

Powers of
referee in
course of
reference.

Discovery.

An official referee has power to make an order granting a commission to examine witnesses abroad, and an appeal lies from his decision to the judge in chambers. (*Hayward v. Mutual Reserve Association* [1891] 2 Q. B. 236; 65 L. T. 491.)

Grant com-
mission.

A referee has no power to commit any person to prison, or to enforce any order by attachment or otherwise. (Order XXXVI. r. 51.)

No power to
commit.

A referee has power under R. S. C. Order XVI. r. 11, to add parties whose presence may be necessary to settle the questions involved in the case. (*Byrne v. Brown*, 22 Q. B. D. 657; 58 L. J., Q. B. 410.)

Amendment.

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Stating a case.

A referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct. (Order XXXVI. r. 52.) This enables the referee to make a preliminary report in the shape of a case for the opinion of the court. (*Re Great Britain Assurance Co.*, 19 Ch. D. 39.)

Explanation may be required from referee.

The court shall have power to require any explanation or reasons from the referee. (Order XXXVI. r. 52.) Such explanations are not given on oath. (*Broder v. Saillard*, 24 W. R. 456; 2 Ch. D. 692; *Rust v. Victoria Graving Dock Co.*, 36 Ch. D. 113, 129.) If the court were satisfied that the referee on the evidence which was laid before him must have decided the case on some ground which in law was untenable, then the court has power to ask the referee his reasons for arriving at the particular conclusion, and also his reason on any particular point of law, if that were necessary, in order to do justice between the parties. (*Miller v. Pilling*, 51 L. J., Q. B. 481; 9 Q. B. D. 736; *per* Cotton, L.J.)

Fees to be taken by official referees.

The fees to be taken by official referees are fixed by "the Order as to Supreme Court Fees, 1884," which came into operation on the 25th day of January, 1884, and which is as follows so far as it relates to—

Proceedings before an official referee :

	£	s.	d.
On every reference	5	0	0
And for every hour or part of an hour he is occupied beyond two full days	0	10	0
On every sitting elsewhere than in London or Middlesex a further fee for every night the official referee shall be absent from London	1	11	6
And for his clerk	0	15	0

By an order dated 20th December, 1887, in proceedings in London or Middlesex, in lieu of the fee of 5*l.*, the fee is 10*s.* for every hour or part of an hour the referee is occupied. CHAP. XIX.

The fees shall become due and payable by the party conducting the proceedings on the report of the result of the reference, or otherwise as hereinafter provided where no such report is made.

When no report or order is made, by the party conducting the proceedings on the completion of such proceedings, or, if not completed, a due proportion shall be payable on so much of the proceedings as shall have taken place, the amount to be fixed by the officer.

In these cases the fees shall be paid by stamps impressed upon or affixed to a memorandum stating on what account such fees are paid.

A deposit of stamps on account of the fees applicable to any proceeding may be required before any such proceeding is commenced, or at any time during the course thereof.

The remuneration (if any) to be paid to a special referee will in each case be determined by the court. (Arbitration Act, 1889, s. 15 (2).) It has in several cases been fixed at five guineas a sitting (*Wallis v. Lichfield*, W. N. (1876) 130; *Court v. Perrin*, M.R., 31st January, 1876, Reg. Lib. B. 127), the referee in each case being a Queen's counsel. In a case in which the inquiry extended over twenty-seven days and parts of days the remuneration allowed was two guineas per hour and twenty-five guineas for the report. (*Collier v. Chadwick*, 79 L. T. Jour. 293.) Remuneration of special referee.

When a matter is referred to an official referee under section 3 of the Arbitration Act, 1889, the referee is in the position of an arbitrator acting under an ordinary submission by consent out of court. Reference by agreement to official referee.

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SECT. 2.—*Reference for Inquiry and Report.*

Reference for
inquiry and
report.

52 & 53 Vict.
c. 49, s. 13.

Subject to rules of court and to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee. (Arbitration Act, 1889, s. 13 (1).)

The court can refer for inquiry and report whether the parties desire it or not.

“Inquiry.”

Inquiry signifies a judicial inquiry by the examination of witnesses, and not merely personal observation. The word is used because the proceedings are not to have the same result as a trial. (*Wenlock v. River Dee Co.*, 19 Q. B. D. 155; 56 L. J., Q. B. 589.)

“Any question arising.”

The words “any question arising” mean only questions which must necessarily arise in the action, and not questions which will only arise if one of the parties is successful on other issues. (*Weed v. Ward*, 40 Ch. D. 555; 58 L. J., Ch. 454.)

Class of questions referred under the section.

In a reference under this section, what the referee has to do is not to dispose of the action, nor to settle the matter at issue, but to report on certain specific questions. If facts are in dispute it may be referred to him to find what the facts are. In that case he is to determine what they are. He is not to decide any issue of fact or law, but to find the materials on which the court is to act. (*Longman v. East*, 3 C. P. D. 142, *per* Bramwell, L.J.; *Badische Anilin, &c. Fabrik v. Levinstein*, 48 L. T. 822.) At the time of the passing of the Judicature Act, 1873, the common law courts had no power to refer only a question in a cause or to direct the arbitrator to report in order that the court might afterwards give judgment in the action. In the Chancery Courts it was a common practice to refer to the chief clerk, not only certain questions, but all the questions in the suit, for him to

report on, and on that report the courts would review what he had reported and make their decree. The Judicature Act, 1873, was framed and passed with the object of having the same practice in all courts, and section 56 of that Act, which has been replaced by section 13 of the Arbitration Act, 1889, gave to all courts the power to refer questions to be reported on in the same way as had been done in Chancery. (*Cruikshank v. Floating Swimming Bath Co.*, 45 L. J., C. P. 684; 1 C. P. D. 260, *per* Brett, L.J.)

In the Chancery Division, instead of sending a case for report to chambers, the judge can send it for report to the official referee (*Longman v. East*, 47 L. J., C. P. 211, *per* Brett, L.J.); and where an inquiry as to damages has been directed, although it is still the practice to send such an inquiry to the chief clerk (*Slack v. Midland Rail. Co.*, 16 Ch. D. 81; 29 W. R. 302, *per* Fry, J.), the judge in his discretion may send it to a referee. (*Ante*, p. 305.) But cases ought only to be referred to assess damages where the inquiry involves questions of detail which it would be wasting the time of the court to investigate. (*Wallis v. Sayers*, 6 Times L. R. 356.) In *Mayor of Birmingham v. Allen* (W. N. (1877) 190), Jessel, M.R., directed a reference to an official referee to inquire and report what damages (if any) the defendants had sustained by reason of an undertaking, given by them, not to work within a certain distance of the plaintiff's gas works. Again, in *Dunkirk Colliery Co. v. Lever* (9 Ch. D. 20; 39 L. T. 239), his lordship referred it to a special referee to report what damages had been sustained by the plaintiffs by reason of the refusal of the defendants to accept certain coal according to contract.

Matters of account may be sent to an official referee instead of being taken by a chief clerk in chambers. (*Rochefoucauld v. Boustead* [1897] 1 Ch. 196.) But the referee is not bound to take the accounts and inquiries

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Reference for report instead of reference to chambers.

Damages.

Accounts.

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Survey and inspection.

In *Broder v. Saillard* (2 Ch. D. 694), where the action was to restrain an alleged nuisance to the plaintiff's house occasioned by damp from the adjoining stables of the defendant, it was referred to an architect, as special referee, "to survey and inspect plaintiff's and defendant's premises respectively, and the premises adjoining thereto respectively, and to report whether or not the plaintiff's premises are affected by noise arising or coming from the defendant's stable as ordinarily used by the defendant, and, if so, then in what manner and to what extent and how the same is caused or arises; and to report whether or not the plaintiff's premises are, or are likely to be, affected by the drainage coming from the defendant's stable as at present used, and, if so, to what extent and in what manner and how the same is caused or arises." So in cases of interference with ancient lights, it has been referred to surveyors, as special referees, to inspect and report. (*Cartwright v. Last*, V.-C. M., 3rd February, 1876; but see *Baltic Co. v. Simpson*, 24 W. R. 390.)

The referee must make a report, not an award.

The referee having heard the evidence, or made the particular inspection or survey, his duty is to report to the court, not to make an award.

The nature of the report required.

The report should ascertain and state the facts of the particular matters referred, and if the inquiry is to ascertain damages, it should state the principle on which the damages have been assessed. (*Mayor of Birmingham v. Allen*, W. N. (1877) 190.) Where the reference is to take accounts, the report must state what items have been allowed, and what disallowed, and not simply the result of the account (*Burrard v. Callisher*, 51 L. J., Ch. 223; 30 W. R. 321); but in a case of complicated accounts

the referee is not bound to deal with each item separately. (Re *Taylor, Turpin v. Pain*, 44 Ch. D. 128; 59 L. J., Ch. 803.) The referee ought not to state his reasons. (*Dunkirk Colliery Co. v. Lever*, 9 Ch. D. 28; 39 L. T. 242; *Walker v. Bunkell*, 22 Ch. D. 722; 31 W. R. 138.) If he can state any facts upon his report, or any figures that will enable the court to revise it and adopt a different conclusion—to adopt the report either wholly or partially—it may be done. (*Ib.*)

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Having made his report, the referee shall on the same day cause notice thereof to be given to all the parties to the trial, or the reference before him, by prepaid post letter to the address for service of each party, who shall in due course of post be deemed to have notice of such report. (Order XXXVI. r. 53.)

Notice of report.

The report may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgment or order to the same effect. (Arbitration Act, 1889, s. 15 (2).)

Power of court to deal with report.

The court may remit the matter for further consideration to the same or any other referee, or if it think fit it may wholly disregard the report, and decide the question referred to any referee on the evidence taken before him, either with or without additional evidence, as the court may direct. (Order XXXVI. r. 52.)

Where the report of the referee has been made in a cause or matter, the further consideration of which has been adjourned, it shall be lawful for any party, on the hearing of such further consideration, without notice of motion or summons, to apply to the court or judge to adopt the report, or without leave of the court or a judge to give not less than four days' notice of motion, to come on with the further consideration, to vary the report or to remit the cause or matter, or any part thereof, for further consideration to the same or any other referee. (Order XXXVI. r. 54.) It is not necessary

When further consideration adjourned,

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for the notice of motion to state the grounds on which it is desired to vary the report, but a party who has given no notice of motion to vary the report or remit the matter for re-hearing will not be allowed to go behind the report and look into the evidence on which it is founded on the application of the other party that the report may be adopted. (*Re Fitton's Estate*, 42 W. R. 281.)

when not.

Where further consideration has not been adjourned it shall be lawful for any party, by an eight days' notice of motion, to apply to the court to adopt and carry into effect the report of the referee, or to vary the report, or to remit the cause or matter, or any part thereof, for re-hearing or further consideration, to the same or any other referee. (Order XXXVI. r. 55.)

Where report
disposes of
action.

When the effect of a report made is to dispose of an action the proper course is not to move for its adoption under this rule, but to set it down on a motion for judgment under Order XL. r. 7. (*Larkin v. Lloyd*, 64 L.T. 507.)

SECT. 3.—*Reference for Trial.*

Reference for
trial.
52 & 53 Vict.
c. 49, s. 14.

In any cause or matter (other than a criminal proceeding by the Crown)—

- (a) If all the parties interested who are not under disability consent: or,
- (b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers: or,
- (c) If the question in dispute consists wholly or in part of matters of account; the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to

be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court. (Arbitration Act, 1889, s. 14.)

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The power to refer the whole action for trial under this section exists, first, where the parties consent, and, secondly, without their consent if the cause or matter requires prolonged examination of documents, &c., or if the dispute is matter of account. Unless there is some substantial question or issue of one of the classes indicated there is no jurisdiction to make a compulsory order under the section. (*Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664; 46 L. T. 669.)

When order made compulsorily.

Reading a great number of letters is not a "prolonged examination of documents" (*Green's Trustee v. Barrett*, W. N. (1875) 204); neither is the consideration of a long set of depositions taken on commission. (*Hamilton v. Merchants' Marine Insurance Co.*, 58 L. J., Q. B. 544.)

"Prolonged examination of documents."

The 57th section of the Judicature Act, 1873, which is repealed, unlike this section, allowed issues of fact only, and not of law, to be referred, and on this ground it was considered that "prolonged examination of documents" within the meaning of the section "must be a prolonged examination of such documents as it is necessary to inquire into and decide upon in order to enable the judge to leave the questions of fact to the jury. If the examination of the documents or a construction of the documents is not at all required in order to enable the trial of the issues of fact, but only to determine a question of legal right, I doubt much whether the examination of such documents is within the meaning of the section." (*Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664; 51 L. J., Q. B. 348; *per Brett, L.J.*) Where to an action for wrongful dismissal the defendant justified the dismissal on the ground of "misconduct, disobedience, negligence, and incompetence," and in his particulars set

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forth, amongst other things, that the plaintiff, being partly paid by percentage on profits, "had invoiced wheat to the customers at incorrect weights, and overcharged them for the wheat actually delivered," it was held that this was a matter involving an unusually and necessarily prolonged examination of documents, because the only way to show that the plaintiff fraudulently put wrong weights in the invoices was by accumulating instances to show that he did it systematically, which involved an examination of books and documents relating to purchases and shipments extending over months. (*Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 425.)

"Scientific investigation."

Issues of fact in a patent case require "scientific investigation" (*Saxby v. Gloucester Wagon Co.*, W. N. (1880) 28), but not so taking expert evidence as to the genuineness of pictures. (*Leigh v. Brooks*, 5 Ch. D. 592; and see *Ormerod v. Todmorden Mill Co.*, *supra*.)

Local investigation.

Mining disputes are not cases which necessarily involve local investigation. (*Case v. Willis*, 8 Times L. R. 677.)

"Matters of account."

The expression "matters of account" will receive a liberal construction. (*Rowcliffe v. Leigh*, 3 Ch. D. 292; 24 W. R. 782.)

The questions of account intended to be dealt with are those which could formerly be referred to a master under section 3 of the C. L. P. Act, 1854. An action on a builder's bill, consisting of many items, each of which it appeared probable from the pleadings would be separately disputed, was held to involve matters of account which could be referred. (*Ward v. Pilley*, 5 Q. B. D. 427; 49 L. J., Q. B. 705.) An action for money had and received, to which there was a plea of an existing partnership, was held to give jurisdiction to refer. (*Goodwin v. Budden*, 42 L. T. 536.) In an earlier case, a claim in an administration suit consisting of twenty-four items, in many or perhaps all of which it appeared questions as to price and

warranty, &c., might arise, was referred. (*Rowcliffe v. Leigh*, 3 Ch. D. 292; 24 W. R. 782.)

When there is a question of account which can be referred compulsorily under section 14 of the Arbitration Act, 1889, the court has power therewith to order the whole action to be referred (*Hurlbatt v. Barnett* [1893] 1 Q. B. 77; 62 L. J., Q. B. 1; and see *Knight v. Coales*, 19 Q. B. D. 296; 56 L. J., Q. B. 486; *Ward v. Pilley*, 49 L. J., Q. B. 705; 5 Q. B. D. 427; *Martin v. Fyfe*, 50 L. T. 72), even when those issues involve questions of fraud affecting the character and reputation of the parties (*Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 425; *Sacker v. Ragazine*, 44 L. T. 308); though, as a general rule, a man is entitled to have a charge of fraud tried in open court, and such issues ought not to be referred, unless so mixed up with matters of account as to be incapable of being tried separately. (*Leigh v. Brooks*, 5 Ch. D. 592; 46 L. J., Ch. 344; *Hoch v. Boor*, *supra*; *Russell v. Harris*, 65 L. T. 752; *Dimmock v. Randall*, 5 Times L. R. 358.)

Where any part of the dispute in a cause or matter relates to a matter of account the cause or matter may be compulsorily referred, although in certain events it may become unnecessary to determine the matter of account. (*Hurlbatt v. Barnett* [1893] 1 Q. B. 77; 62 L. J., Q. B. 1.) But in such a case the court in the exercise of its discretion ought to see that the dispute as to matter of account is a substantial part of the dispute between the parties. (*Ib.*; *Knight v. Coales*, 19 Q. B. D. 296; 56 L. J., Q. B. 486.)

An order of reference may be made on such terms as to costs as the authority making the order thinks just. (Arbitration Act, 1889, s. 20.) In the absence of any provision in the order of reference the referee has the same power over costs as a judge. (Order XXXVI. r. 55*b*.) If neither the order of reference nor the award or report gives costs neither party is entitled to any.

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Jurisdiction to refer some involves right to refer all issues.

Reference though preliminary question as to liability.

Power of referee over costs.

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Issues to be
found
separately.

Where more issues than one are referred for trial, and the costs abide the event, the referee ought to find the issues separately, to enable the taxation of costs to follow the event. (*Ellis v. De Silra*, 50 L. J., Q. B. 328; 6 Q. B. D. 521; *Myers v. Defries*, 49 L. J., Ex. 266; 5 Ex. D. 180; *Stooke v. Taylor*, 5 Q. B. D. 569.) The court ordering judgment to be entered in accordance with the report of a referee is not bound to give any direction to the taxing master as to the costs. (*Rowcliffe v. Leigh*, 26 W. R. 729.)

Directing
judgment.

By the R. S. C. Order XXXVI. r. 50, it is provided that, subject to any order to be made by the court or a judge, a referee shall have the same power to direct that judgment be entered for any or either party as a judge of the High Court. Order XL. rr. 2 and 6 A, make it compulsory upon him after trial of the action to direct judgment.

Effect of
referee's
report.

The report of an official or special referee under a reference for trial (see *Sykes v. Brook*, 29 W. R. 821) shall, unless set aside by the court, be equivalent to the verdict of a jury. (Arbitration Act, 1889, s. 15 (2).) This means it may be enforced by execution in the same way as a verdict.

Judgment
upon the
report.

In signing judgment upon the award of a special referee the original award directing judgment must be produced. When the trial is before an official referee an office copy of his report directing judgment must be produced, the original being previously filed at the filing department. A copy of the pleadings must also be filed, and if the time for judgment dates from service of a copy of the report, an affidavit of such service is also required to be filed. (Annual Practice [1897] 1246, 28 A.)

Sending back
a report to a
referee.

The court may remit a cause or matter referred, or any part thereof, for re-trial or further consideration, to the same or any other referee. (Order XXXVI. r. 52.)

Mode of ap-
plication.

And the proper way to question a report before judgment has been entered, is for the unsuccessful party to move the

court, on notice of motion, to set aside the report and remit the action to the referee. (*Dyke v. Cannell*, 11 Q. B. D. 180; 31 W. R. 747.) This may be done before judgment is entered, but not after. (*Serle v. Fardell*, 44 Ch. D. 299; 62 L. T. 359.)

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The notice of motion to remit a case to an official referee must be given within the time limited for notices of motion for a new trial. (*Forrest v. Todd*, 103 L. T. Jour. 106; *Gower v. Tobitt*, 39 W. R. 193.)

Time for application.

The application in the Queen's Bench Division is to the divisional court. (*Cooke v. Newcastle, &c. Water Co.*, 10 Q. B. D. 332; 52 L. J., Q. B. 337; *Wenlock v. River Dee Co.*, 19 Q. B. D. 155, 160; *Gower v. Tobitt*, 39 W. R. 193.) In the Chancery Division the motion would properly be made to the Court of Appeal. An appeal from the divisional court lies to the Court of Appeal without leave (*Munday v. Norton* [1892] 1 Q. B. 403, 66 L. T. 173), for references under section 14 of the Arbitration Act, 1889, are not to arbitration, as they contemplate a trial, not an award. (*Ib.*)

To what court.

Although the report of a referee upon a trial is equivalent to the finding of a jury, a motion to set aside the report of a referee must be supported by affidavits, the statement of counsel as to what took place before the referee not being sufficient. (*Stubbs v. Boyle*, 25 W. R. 184; 2 Q. B. D. 124.)

Motion to set aside to be supported by affidavit.

A copy of the referee's notes may be produced.

"Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong: provided that, in the Queen's Bench Division, such motion shall be made to a divisional court." (Order XL. r. 6.) In the Chancery Division the application is direct to the Court of Appeal.

Motion to set aside judgment.

To prevent any objection to a notice of motion to

Form of notice.

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Nature and
ground of
appeal against
a report under
s. 14.

With regard to the findings of a referee in an action sent to him for trial under section 14 of the Arbitration Act, 1889, the appeal against his report is in the same nature as an appeal from the finding of a judge when he tries without a jury (*Clark v. Sonnuenschein*, 25 Q. B. D. 464), that is to say, the court must accept the finding of the referee unless they can set it aside according to the ordinary rules which would be applicable to the finding of a jury or to the finding of a judge trying a cause without a jury. It is open to appeal, therefore, whether improper evidence has been received by the referee, or whether the referee, in considering the facts, has, so to speak, misdirected himself. The court can set aside the finding of the referee, if it considers the finding is a finding against the evidence, in the same way that the court can set aside the finding of a jury when their finding is against the evidence. (*Longman v. East*, 3 C. P. D. 155, *per* Brett, L.J.; *Miller v. Pilling*, 9 Q. B. D. 736; *Walker v. Bunkell*, 52 L. J., Ch. 596, *per* Jessel, M.R.; and see *The Lancaster*, 32 W. R. 608.)

APPENDIX.

PART I.

PRECEDENTS AND FORMS.

No. I.

Clause in an Instrument providing for the Reference of future Disputes.

PROVIDED ALWAYS, and it is hereby agreed, that if any difference or controversy shall arise between the parties to these presents, or their respective representatives, or between one of the parties hereto and the representatives of the other of them, touching these presents or any clause or thing herein contained, or the construction hereof, or any matter in any way connected with these presents or the operation thereof, or the rights, duties, or liabilities of either party in connection with the premises, then and in every such case the matter in difference shall be referred to two arbitrators, or their umpire, pursuant to, and so with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in "The Arbitration Act, 1889," or any then subsisting statutory modification thereof: and upon every or any such reference the arbitrators and umpire shall respectively have power to take the opinion of such counsel as they or he may think fit upon any question of law that may arise, and at their or his discretion to adopt any opinion so taken, and to obtain the assistance of such accountant, surveyor, or valuer as they or he may think fit, and to act upon any statement of accounts, survey, or valuation thus obtained: AND that all deeds, papers, writings and evidence

that shall be in the possession or under the control of the said parties, shall be produced to and deposited with the arbitrators or the umpire, at their or his request.



No. II.

The Same—Reference to an Arbitrator named, or to be named, by a Public Official.

AND IT IS HEREBY AGREED that if any question or difference shall arise between the parties hereto or their respective representatives, touching these presents, or the construction thereof, or the rights, duties, or obligations of any person hereunder, or as to any other matter in any wise arising out of or connected with the subject-matter of these presents, the same shall be referred to [the arbitration of A. B., of &c., or, in the event of his death, inability, or failure to act and take upon himself the burden of the reference within fourteen days after notice by one of the parties in difference, sent to him through the post to his usual or last known address in England, that a particular difference has arisen, then to] some competent arbitrator to be named by the President of the Institution. The arbitrator from time to time acting under these presents shall have all the powers conferred on arbitrators by "The Arbitration Act, 1889," or any statutory modification thereof.



No. III.

Clause giving a Valuation the Incidents of a Reference—in Conditions of Sale.

If any error, mis-statement, or omission be discovered in the particulars or conditions, the same shall not annul the sale, but if pointed out before the completion of the purchase, and not otherwise, shall form the subject of compensation, such

compensation to be made to or by the purchaser as the case may require. The amount of such compensation, as well as of any valuation which is provided to be made or taken by these conditions, shall, in case the parties do not agree thereon, be settled by two referees, one to be appointed by each party, or an umpire, to be appointed by the referees, and in case either party shall fail to appoint a referee for the space of ten days after notice shall have been given to him by the other party so to do, the referee appointed by the other party shall make the final decision alone. The provisions of schedule 1 of "The Arbitration Act, 1889," shall apply to a reference under this clause, and the agreement hereunto annexed, incorporating these conditions, shall be deemed to be and have all the incidents of a submission under section 1 of that Act.



No. IV.

Appointment of an Arbitrator under a Clause referring future Differences.

Whereas by an indenture bearing date, &c., and made between A. B., of the one part, and me, C. D., of the other part, it is provided that disputes and differences arising between the parties thereto shall be referred to two arbitrators or their umpire as therein mentioned. And whereas disputes and differences, within the meaning of the said proviso, have arisen, and are now depending between the said parties thereto. NOW, THEREFORE, in pursuance of the power in the said indenture contained, I, the said C. D., do hereby nominate and appoint you, X. Y., of ———, to be the arbitrator on my behalf of and concerning the premises.

As witness my hand this ——— day of ———, 18—.

C. D.

To X. Y., Esquire.



No. V.

Notice of the Appointment to the other Party.

Sir,

I hereby give you notice that I have this day appointed X. Y., of &c., to be the arbitrator on my behalf, to settle by arbitration in pursuance of the proviso in that behalf contained in an indenture dated, &c., the disputes and differences that are now depending between us. And I hereby give you further notice, requiring you within seven days from the service of this notice on you, to name an arbitrator to act on your behalf in the matter of the said disputes and differences, or failing to do so the said disputes and differences will stand referred to the said X. Y. alone.

C. D.

To A. B.



No. VI.

Submission of all Existing Differences to a Single Arbitrator—Short Form.

1. We, the undersigned, hereby agree that X. Y. of ——— shall decide all matters in difference between us, and for that end shall have all the powers given by the Arbitration Act, 1889, to arbitrators, and may direct either of us to do or submit to any act, or to sign or execute any instrument, and may obtain such professional assistance, and may give such directions, as to him shall seem meet. He may proceed *ex parte* if he think fit after such notice as he may deem reasonable.

2. This submission shall not be determined by the death of either of us.

Witness our hands this ——— day of ———.

A. B.

C. D.



No. VII.

Submission of Specific Differences to a Single Arbitrator—Short Form.

AN AGREEMENT made the —— day of ——, 18—, between A. B., of ——, of the one part, and C. D., of ——, —— of the other part: WHEREAS disputes and differences have arisen, and are now depending between the said A. B. and C. D. relative to [*set forth the matters in dispute*]: AND WHEREAS the parties hereto, for the purpose of putting an end to such differences, have agreed to refer the same to arbitration in manner hereinafter appearing: NOW THESE PRESENTS WITNESS that it is hereby agreed as follows (that is to say):—

1. It is hereby referred to E. F., of ——, and in case of his death, incapacity, or unwillingness to act, to G. H., of ——, to award and determine concerning [*set forth the specific matters to be determined*], and all other matters in controversy arising out of the subject of this reference, or in any wise incidental thereto.

2. The arbitrator acting in the matters hereby referred shall have all the powers given to arbitrators by the Arbitration Act, 1889, and shall make his award under his hand on or before the —— day of —— next, or within such extended time, not exceeding —— calendar months after that day, as the said arbitrator shall by writing under his hand appoint.

3. The said arbitrator shall have power to order and determine what he shall think fit to be done by either of the parties hereto respecting the matters in difference.

4. The said arbitrator shall have power to proceed *ex parte* in case either party fail after reasonable notice to attend before him.

5. The respective parties hereto will do and cause to be done all other things necessary and convenient for enabling the said arbitrator to make his award without delay.

6. This submission shall not be revoked by the death of either party before the making of the said award.

IN WITNESS, &c.

No. VIII.

*Submission to Two Arbitrators or their Umpire by Deed—
Ampler Form.*

THIS INDENTURE, made the —— day of ——, 18—, between A. B., of &c., of the one part, and C. D., of &c., of the other part. [*Recite disputes, and agreement to refer*]: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, each of the parties hereto hereby covenants with the other of them, in manner following (that is to say):—

1. It is hereby referred to E. F., of &c., and G. H., of &c., or in case of their disagreement to their umpire [to be appointed by writing under their hands before they enter upon the consideration of the matters referred]*, to award and determine [*set forth the matters to be determined*], so that the award of the said arbitrators or umpire, concerning the same, be made and published in writing, ready to be delivered to the said parties or either of them, or if they, or either of them, shall be dead before the making of the same, to their respective personal representatives requiring the same, on or before the —— day of —— next, or such further day as the said arbitrators, or their umpire, may by writing under their or his hand, indorsed on these presents, from time to time enlarge the time for making their or his said award.

2.* The said arbitrators, at any time before making their award, may by writing indorsed on these presents, appoint an umpire.

3. The said parties hereto, their executors and administrators, will in all respects abide by, observe, perform, and obey the said award so to be made and published as aforesaid.

4. The said parties respectively will do all acts necessary to enable the said arbitrators, or their umpire, to make their or his award herein, and neither of them will wilfully or wrongfully do, or cause to be done, any act to delay or prevent the said arbitrators, or their umpire, from making their

* If the words in brackets in clause 1 are retained, clause 2 will be omitted.

or his award. And if either of the said parties shall wilfully or wrongfully do, or cause to be done, any such act as aforesaid, he shall pay to the other party such costs as the said arbitrators or their umpire may in writing declare to be reasonable.

5. The said arbitrators, or their umpire, shall have general authority to require from either of the said parties such written statements and explanations as may be deemed expedient.

6. In case either party refuse or fail after reasonable notice to attend, either personally or by counsel or solicitor, before the said arbitrators, or their umpire, at any meeting which they or he may appoint, it shall be lawful for them or him to proceed *ex parte* as effectually as if such party were present.

7. The said arbitrators, or their umpire, may in their or his said award order either party to do or to submit to any acts or to sign or execute any written instrument, and in the latter event may direct by whom and at whose expense the same is to be prepared, and may name any counsel by whom the same shall be settled in case the parties cannot agree thereon.

8. Neither of the parties shall bring or prosecute any action against the other or against the said arbitrators or their umpire or either of them, for or in respect of the said matters in difference or any or either of them, or the said award to be made in pursuance of this submission.

IN WITNESS, &c.

No. IX.

Order of Reference of Action by Consent under Arbitration Act, 1889, s. 14 (a).

In the High Court of Justice.

Division.

18—. No. —.

Between

Plaintiff,

and

Defendant.

Upon hearing ——— and by consent

It is ordered as follows :

(a) R. S. C. 1883, App. K., No. 24.

1. [*State matters to be referred*] shall be referred to the award of
2. The arbitrator shall have all the powers as to certifying and amending of a judge of the High Court of Justice.
3. The arbitrator shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award) on or before the ——— next, or on or before such further day as the arbitrator may from time to time appoint and signify in writing signed by him and indorsed on this order.
4. The said parties shall in all things abide by and obey the award so to be made.
5. The costs of the said cause and the costs of the reference and award shall be
6. The arbitrator may (if he think fit) examine the said parties to this cause, and their respective witnesses, upon oath or affirmation.
7. The said parties shall produce before the arbitrator all books, deeds, papers, and writings in their, or either of their custody or power relating to the matters in difference.
8. Neither the plaintiff nor the defendant shall bring or prosecute any action against the arbitrator of or concerning the matters so to be referred.
9. If either party by affected delay or otherwise wilfully prevent the said arbitrator from making an award, he or they shall pay such costs to the other as ——— may think reasonable and just.
10. In the event of either of the said parties disputing the validity of the said award, or moving the ——— to set it aside, the said ——— shall have power to remit the matters hereby referred, or any or either of them, to the reconsideration of the arbitrator.
11. In the event of the arbitrator declining to act or dying before he has made his award, the said parties may, or if they cannot agree, the master may, on application by either side, appoint a new arbitrator.

12. Unless restrained by any order of the court or a judge, the party or parties in whose favour the award shall be made shall be at liberty within —— days after service of a copy of the award on the solicitor or agent of the other party to sign final judgment in accordance with the award, and for all costs that he or they may be entitled to under this order and under the award, together with the costs of the said judgment.

Dated the —— day of —— 18—.

SPECIAL CLAUSES IN SUBMISSIONS.

No. X.

*In a Submission by an Executor or Administrator—
Reference not to be an Admission of Assets.*

The submission to reference hereby made shall not be deemed or taken to be an admission by the said A. B. that he has assets of the said [*deceased*]; but the said A. B. shall be at liberty to deny before the said arbitrator at any time before the case is closed that he has at the time of such denial assets in his hands lawfully liable to the demands of the said C. D.; and if the said A. B. shall make such denial as aforesaid, the said arbitrator, if requested by the said C. D., shall inquire whether or not the same be true. If the said arbitrator shall by his award find any sum of money to be due to the said C. D., he shall, if he shall find that the said A. B. had at the time to which the said inquiry referred, assets liable to the demands of the said C. D., direct the said A. B. to pay to the said C. D. the said sum awarded to be due, or so much thereof as the assets so found to be liable shall be sufficient to satisfy. And if the said arbitrator shall find that the said A. B. had no such assets or not sufficient to pay the whole amount so awarded to be due to the said C. D., he shall be at liberty to award that the said A. B. shall pay to the said C. D. the said amount (or so much thereof as the assets in hand do not avail to satisfy as aforesaid) out of any assets which may have come into the hands of the said A. B. since the time included in the said inquiry as afore-

said, or which may thereafter come into them. And if the said arbitrator shall find any sum of money to be due from the said C. D. he shall direct the latter to pay the same to the said A. B.

No. XI.

Particulars of Claims, &c. to be furnished by each Party.

Each of the said parties within ——— days from the date of these presents, shall deliver to the other of them, and to the said arbitrator, a full and particular account in writing of all his claims, and of all the items thereof, giving credit for all payments, counter-claims, and deductions, and leaving a margin of at least two inches and a half on each page, and shall at the same time deliver all contracts, writings, maps, plans, and drawings, or copies thereof, that may be necessary to illustrate the said account.

Each of the said parties, within ——— days after receiving the said accounts from the other of them, shall state in writing against each item, either actually or by reference in the margin of the said account, or of a copy thereof, whether he admits such item in the whole, or in any and what amount ; and in case he objects to such item shall so state whether he objects to the whole, or to any and what part thereof, and, as far as possible, the grounds of such objection, with reference to maps, plans, or drawings where necessary to illustrate such objection ; and each of the parties shall deliver such statement to the other of them and to the said arbitrator.

The same course shall be adopted concerning any set-off or counter-claim adduced by either of the parties against the demands of the other of them.

No. XII.

Evidence.

The arbitrator may, in his absolute discretion, admit as evidence any affidavit or statutory declaration concerning the matters in difference (and whether the same may have been made in any other proceeding or in contemplation of this

reference), a copy thereof having been given three days previously to the party against whom the same is offered ; but the person whose evidence is so taken shall be subject at any time to cross-examination by such party, if he shall think fit to bring him or her before the said arbitrator.

No. XIII.

Evidence taken by Arbitrators may be acted on by Umpire.

The said umpire shall be at liberty to act upon all or any part of the evidence taken before the said arbitrators as reported by them to him, and to make his award thereupon [unless either of the parties to the reference shall require any witnesses to be reheard or any other evidence to be retaken, or shall tender any fresh evidence, in which case the said umpire shall hear or examine such witnesses or evidence].

No. XIV.

Costs.

The costs of the reference and award shall abide the event of the award.

The costs of the cause shall abide the event of the award as to the cause, and the costs of the reference and award shall be in the discretion of the arbitrator.

Each of the said parties shall bear and pay his own costs of and attending the reference, and the costs of the award shall be borne and paid by the said parties in equal proportions.

The arbitrator shall have the same power as to certifying and otherwise as a judge of the High Court of Justice.

No. XV.

Power to employ an Accountant.

The arbitrator shall be at liberty to employ an accountant, to whose examination he may submit such accounts connected

with the matters hereby referred as he shall think fit. And the said arbitrator may act upon any statement of accounts given by such accountant without being obliged to verify the same.

No. XVI.

Power to have Maps, &c. made.

The arbitrator shall have power to cause such maps, plans, and admeasurements to be made and taken as he shall deem necessary or expedient, and the costs and expenses thereof shall be in the discretion of the arbitrator.

No. XVII.

Power to fix Price of Land and employ a Surveyor in a Submission between a Vendor and Purchaser.

The arbitrator shall have power to fix the price and terms upon which the said, &c., shall be sold by the said E. F. to the said G. H., and to and for that end or for any other purpose in relation to the premises he may, if he shall think fit so to do, require the aid and take the opinion of any surveyor or surveyors or other person or persons, and adopt such other measures and give all such directions as shall to the arbitrator appear advisable or expedient.

No. XVIII.

Power to make Several Awards.

The arbitrator may from time to time make his award upon any question or questions in dispute between the said parties that may have arisen, and he shall not by so doing be deemed or taken to have determined his authority until all matters relating to the premises shall have been finally disposed of. Any separate award shall be observed and performed without waiting for another award.

No. XIX.

*Appointment of a Third Arbitrator by the two others
pursuant to the Submission.*

We, the within-named E. F. and G. H., by this memorandum in writing under our hands made before entering upon the consideration of the matters within referred, do hereby nominate and appoint J. K., of &c., to be the third arbitrator to act with us according to the provisions of the within-written indenture [*or other instrument*], provided that he do, within ——— days from the date hereof, consent to act. As witness our hands this ——— day of ——— 18—.



No. XX.

Appointment of Umpire.

We, the within-named, &c., do hereby appoint J. K., of &c., to be the umpire pursuant to the provisions contained in the within-written agreement of reference, provided that he do within ——— days from the date hereof consent to act. As witness our hands this ——— day of ——— 18—.



No. XXI.

Appointment of a Meeting by Arbitrator.

In the matter of an arbitration between A. B. and C. D.

I appoint the ——— day of ——— next, at the hour of ——— o'clock in the forenoon, at ——— [*the place*], for proceeding in this reference.

Dated ——— 18—.

E. F. [*Arbitrator*].

To ———, solicitor for A. B.,
and ———, solicitor for C. D.



No. XXII.

Appointment of Meeting with Notice of Intention to proceed ex parte.

B. v. D.

I appoint the —— day of —— next, at the hour of, &c., at ——, for proceeding in this reference, and I give notice that in case either party absents himself I shall, at the request of the party present, proceed with the reference *ex parte*.

Dated ——, 18—.

E. F. [*Arbitrator*].

To A. B. and C. D. and their
respective solicitors.



No. XXIII.

Notice requiring a Party to concur in appointing Sole Arbitrator.

In the matter of an arbitration between A. B. and C. D.

Take notice that I hereby request and require you to concur with me, the undersigned, in the appointment of a sole arbitrator to act in the above-mentioned matter, for the purposes of the submission to arbitration contained in an agreement dated the —— day of ——, and made, &c. —— in accordance with clause —— of such agreement, and failing such concurrence I shall forthwith apply to the High Court of Justice to appoint an arbitrator.

Dated the —— day of ——, 18—.

A. B.

To C. D., of &c.



No. XXIV.

*Originating Summons for the Appointment of an Arbitrator.**

In the High Court of Justice.

Queen's Bench Division.

18—. No. —.

In the matter of an arbitration between A. B. and C. D.,

And in the matter of The Arbitration Act, 1889.

Let C. D., of &c., attend the Judge [*or Master*] in Chambers, Central Office, Royal Courts of Justice, Strand, London, on the — day of —, 18—, at — o'clock in the — noon, on the hearing of an application on the part of A. B., of &c., pursuant to section 5 of The Arbitration Act, 1889, that E. F., of &c., or some other fit and proper person, may be appointed to act as arbitrator under a submission dated the — day of —, 18—, and made between the above-named A. B. of the one part and the above-named C. D. of the other part.

Dated the — day of —, 18—.

To the said C. D.

This summons was taken out by —, solicitor for the above-named A. B.

NOTE.—It will not be necessary for you to enter an appearance in the Central Office, but if you do not attend, either in person or by your solicitor, at the time and place above-mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

 No. XXV.
Originating Summons for Leave to Revoke Submission.

In the High Court of Justice.

Chancery Division.

18—. No. —.

Mr. Justice —.

In the matter of an arbitration between A. B. and C. D.,

And in the matter of the Arbitration Act, 1889.

* This is a summons for use on an application to the Queen's Bench Division; the next, on an application to the Chancery Division.

Let C. D., of &c., attend at the Chambers of Mr. Justice ———, Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, on the hearing of an application on the part of A. B., of &c., that the said A. B. may be at liberty to revoke and make void the power of the arbitrator [*or* umpire] to make his award in the reference herein.

Dated the ——— day of ———, 18—.

To the said C. D.

This summons was taken out by ———, solicitor for the above-named

NOTE.—It will not be necessary for you to enter an appearance, &c. [*same as last form*].

No. XXVI.

Summons to stay Action after Agreement to Refer.

In the High Court of Justice.

Division.	18—. No. —.
Between	Plaintiff,
and	
	Defendant.

Let all parties concerned attend the Judge [*or Master*] in Chambers, Central Office, Royal Courts of Justice, Strand, London, on ———day, the ——— day of ———, 18—, at ——— o'clock in the ———noon, on the hearing of an application on the part of the defendant, pursuant to section 4 of the Arbitration Act, 1889, that all proceedings in this action may be stayed, on the ground that the parties have agreed to refer the matter in respect whereof the action is brought, to arbitration, and that the plaintiff may be directed to pay the costs of this application.

Dated the ——— day of ———, 18—.

This summons was taken out by ———, of ———, solicitor for the defendant.

To the above-named plaintiff.

No. XXVII. (a).

Subpoena for Attendance of Witnesses before Arbitrator.

In the High Court of Justice.

Division.

18—. No. —.

In the matter of an arbitration between A. B. and C. D.

And in the matter of the Arbitration Act, 1889.

VICTORIA, by the grace of God, &c., to [*the names of three witnesses may be inserted*], greeting. We command you to attend before ———, at ———, on ———day, the ——— day of ———, 18—, at the hour of ——— in the ———noon, and so from day to day until the above matter is tried, to give evidence on behalf of the above-named C. D.

WITNESS, &c.

No. XXVIII. (b).

*Subpoena duces tecum.**Heading as in last form.*

VICTORIA, by the grace of God, &c., to [*the names of three witnesses may be inserted*], greeting. We command you to attend before ———, at ———, on ———day, the ——— day of ———, 18—, at the hour of ——— in the ———noon, and so from day to day until the above matter is tried, to give evidence on behalf of the above-named ———, and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*].

WITNESS, &c.

No. XXIX.

Summons for Enlargement of Time for making Award.

[*Formal parts according to No. XXIV., or No. XXV., as the case may require*] upon the hearing of an application on the part of ——— for an order that the time limited for the arbitrator making his award between the parties may be enlarged until the ——— day of ———.

(a) R. S. C. App. J., No. 1 ; Order XXXVII. r. 27.

(b) R. S. C. App. J., No. 3.

No. XXX.

Enlargement of Time by Arbitrator under a Power in the Submission.

I, the within-named A. B., hereby [*if a second enlargement "further"*] enlarge the time for making my award concerning the matters comprised in the within-written submission until the —— day of —— 18—.

Dated the —— day of ——.

A. B.

No. XXXI.

Enlargement of Time by the Parties.

We, the within-named A. B. and C. D., do hereby agree to allow unto the within-named arbitrators further time for making their award of and concerning the several matters within referred to them, namely, until the —— day of —— now next ensuing.

IN WITNESS, &c.

[NOTE.—This must be by an instrument of as high a nature as the submission.]

No. XXXII.

Notice to the Parties of the Award made.

In the matter of an arbitration between A. B. and C. D.

—— day of ——, 18—.

Gentlemen,

I hereby give you notice that I have this day made and published my award of and concerning the above matter, and that the same now lies at my chambers ready for delivery upon payment of my charges, amounting to £——.

X. Y. [*Arbitrator*].

To A. B. and his solicitor,
and to C. D. and his solicitor.

No. XXXIII.

Award by a Single Arbitrator determining Cross Claims and ordering Payment of a Sum by one Party to the other.

TO ALL TO WHOM these presents shall come, I, G. L., of the Middle Temple, Esquire, barrister-at-law, send greeting. WHEREAS by an agreement in writing dated the —— day of ——, and made between A. B., of &c., of the one part, and C. D., of &c., of the other part, the said parties agreed to refer all matters in difference between them [*if necessary and "relative to," &c., stating the specific matters*] to me, the said G. L., so that I should make my award thereon ready to be delivered to the said parties on or before the —— day of —— then next. NOW KNOW YE that I, the said G. L., having taken upon myself the burthen of the said reference, and having heard, examined, and considered the witnesses and evidence of both the said parties concerning the said matters so referred to me as aforesaid, do make and publish this my award, of and concerning the same, in manner following, that is to say, I AWARD and determine that the said C. D. has a just and valid claim and demand against the said A. B. to the extent of £——, and that the said A. B. has a just and valid claim against the said C. D. to the extent of £—— [*a less sum*], so that, after deducting the latter sum from the former, there remains justly due to the said C. D. from the said A. B. the sum of £——. AND I award that the said A. B. do and shall, on the —— day of —— next, pay the said sum of £—— unto the said C. D., at his shop in —— street, ——, between the hours of 11 and 12 of the clock in the forenoon. AND I award that the said sum of £—— shall be paid, accepted, and taken as and for full satisfaction and discharge, and as a final end and determination of the said differences in the matters so referred as aforesaid, and all demands upon or in respect of the same by either of the said parties against the other of them. AND I further award that the said A. B. shall bear and pay his own costs of and attending the said arbitration, and shall pay to the said C. D. his costs of and attending

the said arbitration, and shall pay the costs of this my award. [AND I determine the costs of the said C. D. to amount to £——.]

IN WITNESS whereof I have hereunto set my hand this
—— day of ——.

G. L.

Signed in the presence of ——.

The testimonium clause to the duplicate copy of the award will be, "IN WITNESS whereof I have set my hand to this duplicate of my award this —— day of ——."

No. XXXIV.

Award by three Arbitrators, on a Submission by several Persons, respecting Claims under three Wills.

TO ALL TO WHOM, &c., We [*three arbitrators*] send greeting. WHEREAS by an agreement in writing dated the —— day of ——, and made between J. H., of &c., of the first part, J. M., of &c., and Jane his wife (late Jane H., spinster) of the second part, the Reverend J. S., of &c., claiming in right of his late wife, C. S., now deceased, of the third part, C. H., of &c., spinster, of the fourth part, and T. H., of &c., of the fifth part; the said parties agreed to refer all claims which they or any of them had, or pretended to have, by, from, or under the several wills of T. T., G. H., and J. H. respectively, deceased, to the award and final determination of us, the said [*three arbitrators*], so as, &c. [*recite time within which the award to be made, power to direct what shall be done, &c.*]. NOW KNOW YE, that we, the said [*three arbitrators*], having taken upon ourselves the burthen of the said arbitration, and having heard and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before us, by and on behalf of the said parties in difference respectively, and having fully examined into their several alleged claims and interests, under the several and respective wills of the said T. T., G. H., and J. H., deceased, DO FIND, that the said T. T., by his said will, among other specific legacies, gave and bequeathed to his nephew

J. T., who is yet living, the yearly interest of the sum of two hundred pounds, during his natural life : and that after the decease of the said J. T. the said testator gave and bequeathed the said principal sum of two hundred pounds unto and amongst all and every the child and children of his said nephew J. T., who should be living at the time of the decease of the said testator, to be equally divided between them, share and share alike ; and that the said T. T., by his said will, gave, devised, and bequeathed all the rest and residue of his estate, both real and personal (subject nevertheless to the payment of his debts, legacies, and funeral expenses, with which he charged as well his real as his personal estate), to the said G. H., deceased, his heirs, executors, and administrators, whom he appointed sole executor of his said will. AND we further find that the estate of the said T. T., which came to the hands and possession of the said G. H., deceased, was fully sufficient to satisfy and discharge all the debts, legacies, and funeral expenses of the said T. T., and the expenses attending the execution of his said will ; and that a certain freehold house, with a close of land adjoining and thereto belonging, with the appurtenances, situate, lying, and being at ———, in the said county of ———, now in the possession or occupation of the said C. H., was part of the estate of the said T. T., and charged by him in and by his said will with the payment of his debts, legacies, and funeral expenses, as aforesaid ; and remains subject to and chargeable with the bequest hereinbefore mentioned to the said J. T. and his children : and further, that the said T. H., as surviving executor of the will of the said G. H., is entitled to the sum of one hundred pounds, secured by mortgage on a certain freehold house, with the appurtenances, situate at ——— aforesaid, and known by the sign of the White Lion, in the occupation of W. E. : AND we further find that all claim, interest, and demand which the said J. H., Jane M., or the said J. M. in her right, and the said J. S. in right of his said late wife, or either of them, ever had, in or upon the estate or effects or under or by virtue of the wills of the said T. T., G. H., and J. H., or of either of them, have been fully satisfied and discharged. AND we hereby award, that the said

C. H., her heirs, executors, or administrators shall, within one calendar month from the day of the date hereof, deliver into the hands of the said T. H., or of his solicitor, all deeds and other writings in her custody, possession, or power, relating to, or in any way affecting, the said freehold house and premises known by the sign of the White Lion : AND shall also, within one calendar month from the day of the date hereof, execute a conveyance of the fee simple, and deliver possession of the said freehold house and close, with the appurtenances, situate at ——— aforesaid, and all deeds and other writings relating to or in any way affecting the same, or the title thereof, to the said T. H. AND we further award, that the said C. H. shall retain for her own use and benefit all other the effects which came, or which may hereafter come, to her hands or possession as executrix of the last will and testament of J. H. (save and except any rents which she may have received since the decease of the said J. H. for or on account of the said estate at ——— aforesaid) in full satisfaction of all claim, interest, and demand which she has or ever had in or upon the estate and effects or under or by virtue of the said several wills of the said T. T., G. H., and J. H., or of either of them. AND we hereby further award that the said T. H. shall, out of the said mortgage on the said house, with the appurtenances, at ———, called the White Lion, and out of the said freehold house and close at ———, pay, satisfy, and discharge the bequest to the said J. T. and his children, according to the direction of the said will of the said T. T. AND we further award and order that the said C. H. shall account for and pay to the said T. H., his executors or administrators, within one calendar month from the date hereof, all rents which she may have received for or on account of either of the estates at ——— and ——— aforesaid, since the decease of her said brother J. H. AND we do also award and order that the said T. H. shall pay and refund to the said C. H., her executors or administrators, all sum and sums of money which she may have advanced or paid the said J. T., for and on account of the interest of the said sum of two hundred pounds mentioned in the will of the said T. T., since the decease of her said brother J. H. AND we do likewise award,

order, and direct, that the said T. H. shall within one calendar month from the date hereof pay or cause to be paid to the said C. H. the sum of twelve pounds twelve shillings, for and in full discharge of all expenses which she has been at in the repairs of the said houses at ——— and ——— aforesaid, or otherwise howsoever. AND we do further award, that the said C. H. shall give and execute to the said T. H. a release of all demands for or on account of any claim or interest in or upon the estate and effects, or under or by virtue of the wills of the said T. T., G. H., and J. H., or of either of them : and further, that the said C. H. do and shall within one calendar month from the date hereof deliver unto the said T. H., his executors or administrators, all books, accounts, discharges, releases, and writings whatsoever respecting only the estates of the said T. T. and G. H., deceased, or either of them, and which are now in her custody, possession, or power : and that when the said C. H. shall have fully complied with this our award in all things hereby ordered to be done by her, then the said T. H. shall give and execute to her a similar release : and that the said J. H. and J. M. in right of his said wife, and the said J. S. in right of his said late wife, shall give and execute similar releases to the said T. H. and C. H. AND we also award and order that the said T. H. do and shall execute to the said C. H. a bond in the penal sum of eight hundred pounds under a condition to indemnify her the said C. H. against all demands of the said J. T. and his children who were living at the time of the decease of the said T. T., or any person or persons claiming through them ; and also against all and every other person or persons whomsoever claiming under the will and wills of the said T. T. and G. H., deceased, or either of them. AND lastly, we do hereby award and order that the said T. H. shall pay or cause to be paid all charges and expenses attending the present arbitration.

IN WITNESS, &c.

No. XXXV.

Award by two Arbitrators of Compensation for Land taken under the Lands Clauses Consolidation Act (a).

TO ALL TO WHOM, &c., we, A. B., of &c., and C. D., of &c., send greeting. WHEREAS I, the said A. B., have been duly appointed an arbitrator on the part of R. P., of &c., and I, the said C. D., have been duly appointed an arbitrator on the part of the ——— Railway Company (hereinafter referred to as “the Company”), for the purpose of settling by way of arbitration, in pursuance of the Lands Clauses Consolidation Act, 1845, the amount of compensation to be paid by the company for the purchase of all the estate and interest of the said R. P. in the lands and hereditaments specified in the schedule to a certain notice in writing under the hand of the secretary of the company, dated the ——— day of ———, and described in a map or plan annexed to the said notice (of which schedule and map or plan the schedule and map hereunder written and hereunto annexed are respectively copies), and also for the damage (if any) that may be sustained by the said R. P. by reason of the execution of the works of the company. AND WHEREAS the said R. P., by a notice in writing dated the ——— day of ———, and given by him to the company, described his interest in the said lands and hereditaments as an estate of inheritance in fee simple, and claimed the sum of £——— for the purchase of his interest in the said lands and hereditaments, and the further sum of £——— as compensation for injury which would be sustained by him by reason of the severing of the same lands from his other lands and otherwise injuriously affecting such other lands. AND WHEREAS the company offered to pay to the said R. P. the sum of £——— as and for the purchase of the said lands and hereditaments, and for compensation as aforesaid, and have not offered to pay any larger or other sum whatever in respect of the same. NOW KNOW YE, that we, the said A. B. and C. D., having taken upon ourselves the burthen of the said reference, and having, before entering into the consideration of any of the matters so referred to us

(a) For another precedent see Browne and Allen on Compensation, p. 824.

as aforesaid, respectively duly made and subscribed, in the presence of a justice duly authorized in that behalf, the declaration required by the said Lands Clauses Consolidation Act, 1845 (which said declarations are hereunto annexed), and having viewed the lands and hereditaments hereinbefore mentioned or referred to, and having heard, examined, and considered the allegations, witnesses, and evidence of the respective parties, and duly weighed and considered all and singular the matters and things to us referred as aforesaid, Do make and publish this our award in writing of and concerning the said matters as follows, that is to say : WE DO AWARD AND DETERMINE that the sum of £—— ought to be paid by the company to the said R. P. for the purchase of the inheritance in fee simple of the said lands and hereditaments, and that the further sum of £—— ought to be paid by the company to the said R. P. for or in respect of the damage to be sustained by him by reason of the severing of the same from the other lands of the said R. P., or otherwise injuriously affecting such other lands by the exercise by the company of the powers of their Act, or any Act incorporated therewith (a).

No. XXXVI.

Award on a Reference of an Action by Order of the Queen's Bench Division.

TO ALL TO WHOM, &c., I, G. J. N., of &c., send greeting. WHEREAS, by an order made in the High Court of Justice, Queen's Bench Division, on the —— day of ——, by the Honourable Mr. Justice —— : in a certain action, wherein A. B. was plaintiff and C. D. was defendant, it was ordered by consent that the said action should be referred to the award of me, the said G. J. N., and that I should have all the powers as to certifying and amending of a Judge of the High Court of Justice, and that I should make and publish my award in writing of and concerning the matters referred ready to be delivered to the parties in difference, or such of them as might require the

(a) No direction as to costs is necessary (*ante*, p. 230).

same (or their respective personal representatives if either of the said parties should die before the making of the award) on or before the ——— day of ——— then next, or on or before such further day as I might from time to time appoint and signify in writing signed by me and indorsed on the said order ; and it was also ordered that the costs of the cause and the costs of the reference and award should be in my discretion. AND WHEREAS I, the said arbitrator, did, by two several indorsements on the said order, enlarge the time for making my said award until the ——— day of ——— instant. Now I, the said G. J. N., having taken upon myself the burthen of the said reference, and having heard, examined, and considered the allegations, witnesses, and evidence of both the said parties produced before me, do make and publish this my award of and concerning the matters by the said order so referred to me as aforesaid, in manner following, that is to say :—I FIND that the plaintiff had a good cause of action against the defendant in respect of the matters alleged in the statement of claim, and I assess and award the damages which the plaintiff is entitled to recover in the said action at the sum of £———. I FURTHER AWARD that the defendant do bear and pay his own and the plaintiff's costs of the cause, reference, and award. AND I direct that judgment be entered for the plaintiff for the said sum of £——— and costs as aforesaid.

IN WITNESS, &c.

No. XXXVII.

Commencement of an Award on a Reference by an Order of Nisi Prius made at the Assizes.

WHEREAS at the assizes held at ———, in and for the county of ———, on the ——— day of ———, before the Honourable Sir ———, knight, one of the Justices of Her Majesty's High Court of Justice, and others, justices of our lady the Queen, appointed to take the assizes for the said county of ——— : on the trial of an action wherein A. B. was plaintiff, and C. D. was defendant, it was ordered by the court, &c. [*proceeding as in the last precedent*].

No. XXXVIII.

Commencement of an Award on a Submission by Order of the Chancery Division.

WHEREAS by an order of the Chancery Division of the High Court of Justice, made on the —— day of ——, by Mr. Justice ——, in a certain action, in which A. B. and C. D. were plaintiffs, and E. F. and others were defendants, it was, by the consent of the said parties and their counsel, ordered, amongst other things, that, &c. [*reciting the material parts of the order*].

No. XXXIX.

Commencement of an Award on a Submission by mutual Bonds.

WHEREAS by a certain bond bearing date the —— day of ——, A. B., of &c., became bound to C. D., of &c., in the penal sum of £——; and by another bond bearing even date therewith, the said C. D. became bound to the said A. B. in the like penal sum, with conditions written under the said several bonds for making the same void if the said A. B. and C. D. respectively, and their respective heirs, executors, and administrators, should observe, perform, and keep the award of me, &c. [*reciting such of the provisions as will justify the award*].

No. XL.

Commencement of an Award under a Clause for referring future Differences in a Building Contract.

TO ALL TO WHOM, &c. We, R. M., of &c., and G. H., of &c., send greeting. WHEREAS by articles of agreement, bearing date, &c., and made between A. B., of &c., gentleman, of the one part, and C. D., of &c., builder, of the other part, C. D.,

in consideration of the sum of £—— to be paid to him as hereinafter is mentioned, covenanted with A. B., that he, C. D., would at his own expense, on or before the —— day of ——, in a complete and workmanlike manner and with good and substantial materials of all sorts, make the several alterations, reparations, and improvements to a messuage situate, &c., and in such manner as therein is more particularly mentioned and set forth; in consideration whereof A. B. covenanted with C. D., that he would pay unto C. D. the sum of £—— in manner following, that is to say, the sum of £——, part thereof, on the —— day of —— then next ensuing, and the sum of £——, residue thereof, within fourteen days next after the said messuage should be completely repaired and improved in manner as therein is mentioned: and it was thereby mutually agreed, that if any dispute should arise between the said parties relating to the performance of the said articles, then the same should be left to the decision of two indifferent persons as arbitrators, the one to be named by A. B. and the other by C. D., or to an umpire to be chosen by the said arbitrators. AND WHEREAS C. D. has completed the said alterations and improvements, and received the said first payment of the sum of ——. AND WHEREAS disputes have arisen touching the said alterations and improvements, and the same have been referred to us, the said R. M. and G. H. NOW KNOW YE, that we, the said R. M. and G. H., having taken upon ourselves the burthen of the said reference, and having viewed and inspected the several alterations and improvements made in the said messuage by C. D., and having heard the allegations and evidence of both the said parties concerning the matters so referred to us as aforesaid, do make and publish this our award of and concerning the same in manner following, that is to say, &c.

No. XLI.

Commencement of an Umpirage.

TO ALL TO WHOM, &c., I, X. Y., of &c., send greeting.

WHEREAS by an agreement in writing, dated the —— day of ——, and made between A. B., of &c., of the one part, and C. D., of &c., of the other part; after reciting that certain disputes and differences had arisen and were then depending between the said parties, it was agreed that the said disputes and differences should be referred to the award and final determination of E. F., of &c., and G. H., of &c., and in case they should not agree to the award of such person as the said arbitrators should by writing under their hands appoint as umpire, and that the decision of such umpire on the matters referred should be final, so that &c. [*recite time for making award, the power to enlarge, and other powers justifying the subsequent recitals and directions*]. AND WHEREAS the said arbitrators took upon themselves the burthen of the said reference, and by writing under their hands duly appointed me, X. Y., to be an umpire in accordance with the said agreement. AND WHEREAS the said arbitrators differed and were unable to agree upon the matters so referred to them as aforesaid, and thereupon the said disputes and differences stood referred to me for my award and determination thereon as umpire. AND WHEREAS I, the said X. Y., did, by two several memoranda in writing under my hand, indorsed on the said agreement, enlarge the time for making my umpirage and award until the —— day of —— next. Now KNOW YE, that I, the said X. Y., having taken upon myself the burthen of the said reference and umpirage, and having heard, examined, and considered the allegations, witnesses, and evidence of both the said parties concerning the premises, and done and performed all things necessary to enable me to make my umpirage and award of and concerning the said disputes and differences and the matters referred as aforesaid, do make and publish this my umpirage and award of and concerning the same in manner following, that is to say, &c.

No. XLII.

Recital of Enlargement of Time by Consent of the Parties.

AND WHEREAS by an indorsement on the said agreement, bearing date the ——— day of ———, and under the hands of the said A. B. and C. D. [*or of all the said parties to the said agreement*], the time limited in the said agreement for us to make our award was enlarged until the ——— day of ——— next ensuing.

No. XLIII.

Recital of Enlargement of Time by several Orders of Court.

AND WHEREAS the time for making and publishing my award, in pursuance of the said recited order, hath, by several orders of the said court made from time to time, by and with the consent of the said parties, been and the same now stands enlarged, until the ——— day of ——— next.

No. XLIV.

Award on a general Reference by a Mortgagor and Mortgagee—Mortgagor to pay a Sum in full of all Demands—Estates to be re-conveyed and Mortgagor to be let into Possession and receive Arrears of Rent—Mortgagee to give a general Release.

NOW KNOW YE, that we the said [*two arbitrators*], having, &c., do order and award THAT the said C. D. shall pay, or cause to be paid, unto the said A. B. the sum of £——, on the ——— day of ——— now next, at the office of ———, solicitor, at ———, in the said county of ———, between the hours of ten and twelve, in the forenoon, in full satisfaction of all her claims and demands on account of principal, interest, and other moneys, costs, charges, and expenses whatsoever

owing, or that have accrued to the said A. B. under or by virtue of her said mortgage security or otherwise. AND we hereby further award, order and declare, that on payment of the said sum of £—— by the said C. D. to the said A. B., on the day and at the time and place aforesaid, she the said A. B. shall, at the expense of the said C. D., execute unto the said C. D. a re-assignment of all the mortgaged hereditaments for and during all the residue of the said term of years, or other her estate and interest therein; and also shall, on the day and at the time and place aforesaid, deliver or cause to be delivered unto the said C. D. all deeds, evidences, and writings whatsoever in her custody, power, or possession which relate to or concern the mortgaged premises, or any part or parcel thereof. AND we do hereby further order and award that the said C. D., his heirs, executors, administrators, or assigns, shall be thereupon let into the quiet and peaceable possession of all and singular the said mortgaged premises. And that he the said C. D. shall be entitled unto all such arrears of rent of the mortgaged premises as now are or shall be on the said —— day of —— next in the hands of the present tenants thereof. AND we hereby further order and award that she the said A. B. shall, upon receiving the said sum of £——, at the expense of the said C. D., execute unto the said C. D. a good and sufficient release of all claims and demands and causes of action which she the said A. B. shall or may have, claim, challenge, or demand against the said C. D.

No. XLV.

Award that a Partnership be dissolved, A. B. to receive all Co-partnership Debts and use C. D.'s Name in any Action; A. B. to pay all Demands on the Co-partnership and indemnify C. D. therefrom; C. D. to deliver up all Co-partnership Books and accept a certain Sum in full of all Demands.

NOW KNOW YE, that I, &c., having, &c., do make this my award of and concerning the matters so referred to me as

aforesaid, in manner following, that is to say :—*First*, I award that the said co-partnership shall be taken to have determined on the ——— day of ———, as from which date the said A. B. shall be taken to have carried on the said business on his own account. *Secondly*, I value and ascertain the assets of the said partnership business, including the leasehold business premises, and after making allowance for bad and doubtful trade debts, at £———. I find that the trade liabilities amount to £———, leaving a balance of £———divisible between the partners in equal shares. *Thirdly*, I award and direct that the said A. B. shall and may get in and receive to his own use, without the interference of the said C. D., all debts due and owing to the said co-partnership from any person whomsoever, and may use the name of the said C. D. in any action or other proceeding to be commenced for the recovery of any such debt or demand ; and the said A. B. shall pay and discharge all debts owing by and all claims whatsoever, against the said co-partnership. *And* shall indemnify the said C. D. against all such debts and claims and any loss or damage that may be incurred or sustained by the said C. D. by reason of his name being used in any such action or other proceeding so to be commenced as aforesaid, in pursuance of the authority hereby given to the said A. B. *Fourthly*, I award and direct that the said C. D. shall at any time or times, upon the request of the said A. B., deliver up to the said A. B. all and every the books, papers and writings which may be in the custody, power, or possession of him the said C. D. in anywise relating to or concerning the business of the said co-partnership. *Fifthly*, I award and direct that the said A. B. shall on the ——— day of ——— next, at the office of Messrs. R. & T., solicitors, at ——— aforesaid, pay unto the said C. D. the sum of £———, which sum the said C. D. shall accept as the purchase consideration for and in full satisfaction of his share and interest in the said partnership business and the assets thereof, and of all claims against the said A. B. in relation thereto, and thereupon the said C. D. shall execute to the said A. B., if required, an assignment and release of all his share and interest in the said

partnership, stock-in-trade and effects, goodwill and business premises. [*Directions as to costs.*]

No. XLVI.

Award on a Reference between Landlord and Tenant, finding that certain Covenants have been broken, and ordering Payment of a Sum in respect thereof.

NOW KNOW YE, that I, &c., having, &c., do make this my award of and concerning the matters so referred to me as aforesaid, in manner following, that is to say: *First*, I adjudge and award that the said A. B. [*lessee*] has not performed and fulfilled the several covenants contained in the lease of the said farm for laying a certain quantity of lime and bone manure thereon, for scouring and ditching, for repairing the farm buildings, hedges, and fences, and for managing certain portions of the said farm according to the four years' course of husbandry. *Secondly*, I adjudge and award that the said A. B. has not performed and fulfilled the covenants in the said lease for keeping in repair a fence separating a field called the Higher Lea, part of the said farm, from the park lands of the said C. D. [*lessor*], in consequence whereof cattle being depastured in the said Higher Lea have strayed into the said park lands. *Thirdly*, I adjudge and award that the said C. D. has sustained damages to the extent of £—— by reason of the breaches hereinbefore mentioned of the several covenants contained in the said lease. [*Add direction to pay that amount, and award as to costs.*]

No. XLVII.

Award under the Agricultural Holdings Act, 1883.

TO ALL TO WHOM, &c., I, X. Y., of &c., send greeting.
WHEREAS for some years past A. B., of &c., has occupied and farmed a certain holding known as the Grange Farm

A.

A A

as tenant thereof to C. D., of &c., upon the terms of a lease dated, &c., and made between, &c. AND WHEREAS the said tenancy determined, and A. B. quitted his holding, on the ——— day of ———. AND WHEREAS by notice in writing dated the ——— day of ———, 18—, given by A. B. to C. D., he, A. B., claimed compensation under the provisions of the Agricultural Holdings Act, 1883, in respect of the several matters specified in the first column of the first schedule hereto. AND WHEREAS by a notice in writing dated the ——— day of ———, 18—, given by C. D. to A. B., he, C. D., counter-claimed in respect of the several matters specified in the first column of the second schedule hereto. AND WHEREAS A. B. and C. D. were unable to agree as to the said claim and counter-claim, and by writing under their hands, dated the ——— day of ———, appointed me, the said X. Y., sole referee to settle the matters in difference between them pursuant to the provisions of the said Act. NOW KNOW YE, that I, the said X. Y., having taken upon myself the burthen of the said reference, and having viewed the said farm, and heard and examined the allegations and evidence of the parties, do make my award of and concerning the matters referred to me as follows:—

1. I find and award that A. B. is entitled to compensation from C. D. in respect of the several improvements specified in the first column of the first schedule hereto, the several amounts, and no more, set opposite the same respectively in the third column of the same schedule, and amounting in the aggregate to £——.

2. I find that such improvements were executed at the times set opposite the same in the second column of the same schedule.

3. I have in the fourth column of the said schedule set opposite to the several improvements the several matters and things taken into account under the provisions of the said Act in reduction or augmentation of such compensation, other than the matters hereinafter mentioned.

4. I find and award that C. D. is entitled to compensation from A. B., in respect of the matters specified in the first

column of the second schedule hereto, the several amounts set opposite the same in the second column of the same schedule, which sums amount in the aggregate to £——.

5. I find that there is also due from A. B. to C. D. £—— for rent, and £—— in respect of tithe rent-charge, making, together with the sums mentioned in clause 4, the sum of £——.

6. After deducting the said sum of £—— from the sum of £—— there is a balance of £—— due to A. B. from C. D., and I award and direct C. D., at the expiration of one calendar month after the delivery of this my award, to pay the said sum of £—— to A. B.

7. I award and direct C. D. at the same time to pay to A. B. his costs of and attending the reference, and also to pay the costs of this my award [*or*, I direct each party to bear and pay his own costs of the reference, and one half the costs of this my award].

IN WITNESS, &c.

The FIRST SCHEDULE above referred to.

Improvements.	Date of Execution.	Compensation Awarded.	Matters taken into Account in Compensation.

The SECOND SCHEDULE above referred to.

Subject of Claim.	Compensation Awarded.

SPECIAL CLAUSES IN AWARDS.

No. XLVIII.

Each Party to pay his own Costs of Reference and one-half the Costs of Award.

I AWARD that each of the said parties shall and do bear and pay his own costs of this reference ; and that the costs of this my award be paid in equal moieties between them.

No. XLIX.

Costs of Reference and Award to be paid in equal Moieties.

I AWARD that the costs and charges of this reference and the charges of making this my award shall be paid and borne by the said A. B. and C. D. in equal moieties.

No. L.

Certificate for Special Jury, &c.

I CERTIFY that this cause was proper to be tried before a special jury [*or* before a judge of the superior court, and not before a judge of an inferior court : *or* that the action was brought to try a right other than the mere right to recover damages].

No. LI.

Mutual Releases if required.

AND I farther award that upon payment of the said sum of £——— to the said A. B., as aforesaid, they, the said A. B. and C. D., if required, shall respectively, at the costs and charges of the party requiring the same, execute, each unto the other of them, mutual general releases of all manner of actions, causes of action, claims and demands whatsoever.

No. LII.

*One Party to execute a Release on Payment of Money
by the other Party.*

AND I further award and order that, upon payment of the said sum of £——— to the said A. B. as aforesaid, the said A. B. shall at his own expense prepare and execute a proper release to the said C. D. of all claims and demands which he the said A. B. at the date of the said submission had, or might, or could have had, claimed or demanded, against the said C. D. for or on account of all or any of the matters and things thereby submitted to my award as aforesaid.

No. LIII.

Release at the Cost of the Party released.

AND that upon payment of the said sum, the said A. B. shall, if required so to do by, and at the cost of, the said C. D., execute and deliver to him the said C. D. a valid and effectual release of, &c.

No. LIV.

Award on the several Issues in an Action.

I FIND for the plaintiff on all the issues raised, except that of special damage, which I find for the defendant. I also find that the sum paid into court was sufficient to satisfy the plaintiff's claim. I direct that judgment be entered, &c.

I FIND for the plaintiff in respect of the claim for rent for £———. I also find for the plaintiff in respect of the breaches of covenant alleged in paragraph —— of the statement of claim, and I assess the damages at £———. I find for the defendant on all the other issues in the action. And I direct that judgment be entered, &c.

No. LV

Award on a Plea of non est factum.

As to the issue joined in this action, I award and find, that the indenture is the deed of the defendant in manner and form as the plaintiff has alleged; and I assess the damages of the plaintiff by reason of the breaches of covenant alleged in the statement of claim at £——, for which sum and the costs of, &c., I direct that judgment be entered for the plaintiff.

No. LVI.

Award of Verdict for the Defendant.

I AWARD and order that the verdict entered for the plaintiff shall be set aside, and a verdict be entered for the defendant on all the issues [*or for the plaintiff on the —— issue and for the defendant on the —— issue*].

No. LVII.

Award on Action, Counter-claim, and Set-off.

I FIND that the plaintiff is entitled to recover from the defendant the sum of £—— in respect of the matters alleged in the statement of claim, and I find that the defendant is entitled to recover from the plaintiff the sum of £—— in respect of the matters alleged in the counter-claim, and I hereby direct that judgment be entered for the plaintiff for the sum of £——, being the difference between the said sums of £—— and £——.

I AWARD and find that the plaintiff was and is entitled to recover in this action, from the defendant, the sum of £—— in respect of the matters alleged in paragraphs 3 and 4 of the statement of claim, and the sum of £——, over and above the amount paid into court, in respect of the matters alleged in

paragraph 5 of the statement of claim. I direct the defendant to pay to the plaintiff the said two sums, making together the sum of £———. I find that the plaintiff has no cause of action in respect of the matters mentioned in paragraphs 7 and 8 of the statement of claim. I find that as to the sum of money claimed in paragraph 10 of the statement of claim the defendant is entitled to a set-off as to the whole, in respect of the matters mentioned in paragraph 5 of the defence. I direct judgment, &c.

No. LVIII.

Award in Ejectment.

I AWARD and adjudge, that the plaintiff in this action is entitled to the possession of the lands sought to be recovered in this action: [*or that the plaintiff in this action is entitled to the possession of a certain parcel of the lands sought to be recovered in this action, that is to say [description], which said parcel is delineated and coloured pink in the map annexed to and intended to form part of this my award. And I further award and adjudge, that the plaintiff is not entitled to the possession of the residue of the said lands, consisting of [description], which residue is delineated and coloured green in the said map. And I further award and adjudge that the defendant is entitled to the possession of the said residue].*

No. LIX.

Award of a Conveyance of Freeholds.

I AWARD and direct that the said C. D. shall, within one calendar month from the date hereof, execute a conveyance, in fee simple, of all, &c. [*describing the parcels*], unto the said A. B., and that the said A. B. shall, at his own cost, prepare and tender the said conveyance for execution by the said C. D.

No. LX.

Award of an Assignment of a Lease.

I AWARD and direct that, in consideration of £—— here-
 tofore paid by the said C. D. to the said A. B., and of £——,
 hereby directed to be paid by the said C. D. to the said A. B.,
 upon the execution of the deed of assignment hereinafter men-
 tioned, the said A. B. shall, on the —— day of ——, at
 the office of ——, the solicitor for the plaintiff in the said
 action, situate at, &c., execute a valid deed of assignment to
 C. D. of all his right, title, and interest, in the unexpired
 residue of a term of 99 years, granted by a lease, dated the
 —— day of ——, by one H. G. to the said A. B. of certain
 premises heretofore occupied by the said A. B. and T. T. as a
 smith's shop and wareroom, situate and being at, &c., subject,
 nevertheless, to the rent, covenants, and conditions by and in
 the said lease reserved and contained. And I further award
 and direct that the said C. D. shall pay and satisfy all arrears
 of rent and taxes which have arisen, accrued, or become due,
 for or on account of the said premises, since the —— day of
 ——.

[*Award costs of preparing the assignment.*]

No. LXI.

Award to deliver up a Bond to be cancelled.

I AWARD that a certain bond or obligation for the sum of
 £——, dated the —— day of ——, 18—, and given
 by the said A. B. to the said C. D., be delivered up by the said
 C. D. to the said A. B. to be cancelled, or that a proper release
 be given for the same in case such bond or obligation should
 appear to have been lost or mislaid.

No. LXII.

Award of a Wall to be built.

I AWARD that the said A. B. shall, within one calendar month from the date hereof, at his own expense, erect and make a sufficient fence or wall of brick of the thickness or breadth of nine inches at least, and of the height of six feet, extending from that corner of his garden marked with the letter A on the plan appended to and intended to form part of this my award to that corner of the stable in the occupation of the said C. D., which is marked with the letter C on the said plan, according to a line drawn in red ink on the said plan.

No. LXIII.

Award of a Wall to be pulled down.

I AWARD and determine that the wall of brick, intended to form the gable end of a building now being erected and built by the said C. D., extends six inches beyond the property of the said C. D. on to the property of the said A. B. And I further award and direct that the said C. D. do and shall, within one calendar month from the date hereof, pull or take down the said brick wall; and that he shall and may, at any time thereafter, erect a fresh wall, in a line parallel with the said existing wall, but so that the outside thereof shall be at least six inches to the north-east of the outside of the said existing wall.

No. LXIV.

Award of Manner in which a Weir is to be maintained in future.

I AWARD and determine that the defendant is entitled to keep and maintain his said weir of the depth of fourteen inches and no more; and for the purpose of defining, denoting, and

perpetuating the limit of the said depth at which the defendant is entitled to keep and maintain his said weir as aforesaid, I have caused to be placed certain marks and erections near the said weir, and I declare that the said marks and erections correctly denote and define the depth at which the defendant is entitled to maintain the said weir. And I further award and declare that the map or plan hereunto annexed and signed by me defines and describes the depth of the said weir, and the said marks and erections so caused to be placed by me, as aforesaid, for perpetuating, denoting, and defining the same. And I do further award and order that the costs and charges incurred by placing the said marks and erections be borne by the defendant, and that they be for ever hereafter kept in repair and maintained by the defendant.

No. LXV.

Award that one Party has no Interest in the Subject of Reference.

I AWARD that the said C. D. hath not, nor at any time whensoever had, any interest, right, title, claim, or demand whatsoever in, to, or in respect of the said ship or vessel.

No. LXVI.

Award that the Property in Premises is in one Party, subject to an Easement of the other Party.

I AWARD that the said passage, yard, and pump are the property of the said A. B., subject to the right of the said C. D. to the free use of water from the said pump in common with the said A. B., and of ingress and regress into and out of the said yard by and over the said stile for the purpose of fetching water therefrom, and for all other purposes, at his own free will and pleasure. And I also award that the said

pump shall in future be repaired at the joint expense of the said A. B. and C. D.

(And see *Boodle v. Davies*, 3 A. & E. 200, for similar forms.)

No. LXVII.

*Certificate of an Arbitrator when a Verdict is taken
subject to his Certificate.*

In the High Court of Justice.

Queen's Bench Division.

A. B. v. C. D.

I hereby certify that the verdict which has been entered for the plaintiff do stand, but that the damages be reduced to £——.

M. N. [*Arbitrator*].

To —— [*Associate*].

No. LXVIII.

*Award on a former Award being sent back to the
Arbitrator for his Reconsideration.*

TO ALL TO WHOM, &c. WHEREAS by an order of the High Court of Justice, Queen's Bench Division, made the —— day of ——, it was ordered that my award dated the —— day of —— should be referred back to me to reconsider and amend the same. Now I, the said A. B., having reconsidered my said award [*or, where further evidence has been adduced, having taken upon myself the burthen of this further reference, and having heard and duly considered the allegations and evidence further made and adduced by the said parties*], do hereby award and direct that the following amendments be made in my said award dated the —— day of ——, that is to say ; [*stating the amendments to be made*]. AND in all other respects I confirm my said award made in the matter of this reference and dated the —— day of ——.

IN WITNESS, &c.

[For precedent of an amendment in the name alone by indorsement on the former award, see *Howett v. Clements*, 1 C. B. 128 ; *Davies v. Pratt*, 17 C. B. 173.]

No. LXIX.

Summons for Leave to enforce Award under Section 12 of Arbitration Act, 1889.

In the High Court of Justice. 18—. No. —.
Queen's Bench Division (a).

In the matter of an arbitration between A. B. and C. D.

And in the matter of the Arbitration Act, 1889.

Let C. D., of &c., attend the Judge [*or Master*] in Chambers, Central Office, Royal Courts of Justice, Strand, London, on the —— day of ——, 18—, at —— o'clock in the ——noon, on the hearing of an application on the part of A. B., of &c., for leave to enforce the award dated the —— day of —— in the above arbitration in the same manner as a judgment or order to the same effect, and for an order that the said C. D. do pay the costs of this application, to be taxed. [*Conclude as in No. XXIV.*]

No. LXX.

Notice of Motion to set aside or remit an Award.

In the High Court of Justice.
Division.

In the matter of an arbitration between A. B. and C. D.

And in the matter of the Arbitration Act, 1889.

Take notice that the court will be moved on ——day, the —— day of ——, 18—, at —— o'clock in the forenoon, or so soon thereafter as counsel can be heard, by counsel on behalf of the said A. B., for an order that the award made

a) For formal parts of a summons in the Chancery Division, see No. XXV.

between the parties to the above-mentioned arbitration by X. Y., and dated the —— day of ——, 18—, may be set aside (or remitted to the arbitrator for his reconsideration) on the grounds [*state the grounds shortly, thus*—(1) That the arbitrator exceeded his authority in requiring the said A. B. to accept delivery of the goods with an allowance for inferior quality; (2) that the award is bad on the face of it for uncertainty; (3) that the award is bad as not being final; (4) that the award does not deal with all the matters submitted to the arbitrator; (5) that the arbitrator has been guilty of misconduct in making his award upon the matters referred without having first fully heard the witnesses and evidence of the parties], and for an order that the costs of this application may be [costs in the reference].

And further take notice that in support of such motion the said A. B. intends to read the affidavits of —— and ——, copies of which affidavits are served herewith.

Dated the —— day of ——, 18—.

(Signed) M. N., of

Solicitor for N. B.

To the above-named C. D.

REFERENCE TO REFEREES.

No. LXXI.

Summons for Reference to a Referee.

In the High Court of Justice.

Division.

18—. No. —.

Between

Plaintiff,

and

Defendant.

Let all parties concerned attend the Judge [*or Master*] in Chambers on ——day, the —— day of ——, 18—, at —— o'clock in the ——noon, on the hearing of an

For a reference under s. 13.

application on the part of [“ the plaintiff [or defendant] that the following questions arising in this action, viz. [*state them*] may be referred to the official referee in rotation for inquiry and report, pursuant to section 13 of the Arbitration Act, 1889 ”].

Another form.

Or, “that it may be referred to ———, Esquire, as special referee, under section 13 of the Arbitration Act, 1889, to survey and inspect the premises of the plaintiff and defendant respectively, and the premises adjoining thereto respectively, and to report whether or not the plaintiff’s premises are affected by noise arising or coming from the defendant’s stables as ordinarily used by the defendant, and if so, then in what manner and to what extent, and how the same is caused or arises ; and also to report whether or not the plaintiff’s premises are or are likely to be affected by the drainage coming from the defendant’s stables as at present used, and if so, to what extent and in what manner, and how the same is caused or arises.”

For a trial under s. 14.

“ On the part of the ——— that the whole of this cause may be tried before the official referee in rotation [*or before* ———, Esquire, as special referee, *or before a special referee to be agreed on by the parties*], pursuant to section 14 of the Arbitration Act, 1889, *or that the following issues [or questions] of fact, viz. [*state them shortly*], may be tried before, &c.”*

Dated the ——— day of ———, 18—.

This summons was taken out by ———, of ———, solicitor for ———.

To ———.

No. LXXII.

Order of Reference under Section 13 of Arbitration Act, 1889 (a).

In the High Court of Justice.

Division.

18—. No. —.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

(a) R. S. C. App. K., No. 32.

Upon hearing ——— and upon reading the affidavit of ———, filed the ——— day of ———, 18—, and ———,

It is ordered that the following question arising in this action, namely ———, be referred for inquiry and report to ——— under section 13 of the Arbitration Act, 1889, and that the costs of this application be ———.

Dated the ——— day of ———, 18—.

No. LXXIII.

Order of Reference under Section 14 of the Arbitration Act, 1889 (a).

the High Court of Justice.

Division.

18—. No. —.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing the solicitors on both sides, and upon reading the affidavit of ———, filed herein,

It is ordered that the whole of this cause be tried before an official referee, who shall have all the powers of certifying and amending of a Judge of the High Court of Justice, and shall direct judgment to be entered and otherwise deal with the whole action pursuant to Order XXXVI.

Dated the ——— day of ———, 18—.

No. LXXIV.

Appointment by Special Referee of Time and Place of Hearing.

In the High Court of Justice.

Division.

Between A. B. . . Plaintiff,

and

C. D. . . Defendant.

(a) R. S. C. App. K., No. 33a.

I, A. B., of ———, in the county of ———, appoint the ——— day of ——— next, at the hour of ——— o'clock, at ———, as the time and place at which I shall sit to proceed with the inquiry into [or trial of] the matters referred to me as special referee by the order of Mr. Justice ———, made herein and dated the ——— day of ———, 18—. And I require all persons concerned to attend before me accordingly.

Dated the ——— day of ———, 18—. A. B.

No. LXXV.

Report of Special Referee.

In the High Court of Justice.

Division.

Between A. B. . . . Plaintiff,

and

C. D. . . . Defendant.

I, A. B., of &c., to whom as special referee it was by an order made by Justice ——— herein dated the ——— day of ———, 18—, referred to try the following issues of fact, viz. [state them], now I having tried the same accordingly, beg to report to the court that I find as follows : [state findings].

Dated this ——— day of ———, 18—. A. B.

No. LXXVI.

Notice of Motion to vary or remit Report on further Consideration.

Take notice that the court will be moved when the further consideration of this cause comes on, that the report of ——— herein may be varied by [state how] [or remitted to the said ——— for reconsideration in the following respects, viz. :—]

No. LXXVII.

*Notice of Motion to adopt, &c., Report, when further
Consideration not adjourned.*

[Formal parts as in No. LXXVIII.]

Take notice, that the court will be moved on ——day, the —— day of ——, 18—, or so soon thereafter as counsel can be heard, by counsel on behalf of the plaintiff, that the report of ——, the referee appointed herein, dated the —— day of ——, 18—, be adopted and carried into effect by an order that [*set out order required*].

Dated the —— day of ——, 18—.



No. LXXVIII.

Notice of Motion for remitting Report when Cause tried.

In the High Court of Justice.

Division.

18—. No. —.

Between

Plaintiff,

and

Defendant.

Take notice, that the court will be moved on ——day, the —— day of ——, 18—, [at —— o'clock in the forenoon], or so soon thereafter as counsel can be heard, by counsel on behalf of the plaintiff, that the report of ——, Esquire, an official referee, made herein, dated the —— day of ——, and the judgment directed to be entered in this cause may be set aside, and that the cause may be remitted to the said referee for reconsideration, on the grounds that [*state grounds*],—or “that the judgment directed to be entered herein for the defendant may be set aside, and that judgment may be

entered for the plaintiff for [*state the judgment sought*], on the ground that the judgment directed to be entered is wrong by reason that" [*state the ground*].

Dated the —— day of ——, 18—.

(Signed)

of

agent for

solicitor for the

To ——.

PART II.

STATUTES.

8 & 9 VICT. c. 18, ss. 23—37.

An Act for consolidating in one Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature.

23. If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly ; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided.

Compensation exceeding 50*l.* to be settled by arbitration or jury, at the option of the party claiming compensation.

24. It shall be lawful for any justice, upon the application of either party with respect to any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized to be settled by two justices, to summon the other party to appear before two justices, at a time and place to be named in the summons, and upon the appearance

Method of proceeding for settling disputes as to compensation by justices.

of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such justices to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, upon oath, and the costs of every such inquiry shall be in the discretion of such justices, and they shall settle the amount thereof.

Appointment of arbitrator when questions are to be determined by arbitration.

25. When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if, for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

Vacancy of arbitrator to be supplied.

26. If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become in-

capable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

27. Where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act, and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final.

Appointment of umpire.

28. If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade [*in any case in which a railway company shall be one party to the arbitration, and two justices in any other case*] (a) shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final.

Board of Trade empowered to appoint an umpire on neglect of the arbitrators, in case of railway companies.

29. If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration under the provisions of this or the special Act in the same manner as if such arbitrator had not been appointed.

In case of death of single arbitrator the matter to begin *de novo*.

30. If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and

If either arbitrator refuse to act, the other to proceed *ex parte*.

(a) The words in brackets are repealed by 46 & 47 Vict. c. 15, and see 37 & 38 Vict. c. 40, s. 6.

the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

If arbitrators fail to make their award within twenty-one days, the matter to go to the umpire.

31. If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

Power of arbitrators to call for books, &c.

32. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Arbitrator or umpire to make a declaration.

33. Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall in the presence of a justice make and subscribe the following declaration ; that is to say :—

“ I, A. B., do solemnly and sincerely declare, That I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the Act [*naming the special Act*].

“ A. B.

“ Made and subscribed in the presence of .”

And such declaration shall be annexed to the award when made ; and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto, he shall be guilty of a misdemeanor.

Costs of arbitration how to be borne.

34. All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

35. The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose.

Award to be delivered to the promoters of the undertaking.

36. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties.

Submission may be made a rule of court.

37. No award made with respect to any question referred to arbitration under the provisions of this or the special Act shall be set aside for irregularity or error in matter of form.

Award not void through error in form.

12 & 13 VICT. c. 45, ss. 12—15.

An Act to amend the Procedure in Courts of General and Quarter Sessions of the Peace in England and Wales, and for the better Advancement of Justice in Cases within the Jurisdiction of those Courts.

12. "And whereas by a statute passed in the tenth year of King William the Third, intituled 'An Act for determining Differences by Arbitration,' provision was made for rendering more effectual the awards of arbitrators in the case of controversies and disputes for which there is no other remedy but by personal action or by suit in equity: and whereas it is expedient in like manner to facilitate and render more effectual references to arbitration of controversies and disputes for which the remedy is by appeal to a court of general or quarter sessions of the peace:" be it enacted, that at any time after notice given of appeal to any court of general or quarter sessions of the peace against any order, rate, or other matter (except a summary conviction, or an order in bastardy, or any proceeding under or by virtue of any of the statutes relating to Her Majesty's revenue of excise or customs, stamps, taxes or

References to arbitration.

post office), for which the remedy is by such appeal, "it shall be lawful for the parties, by themselves or their attorneys, and by order of a judge of Her Majesty's Court of Queen's Bench, to submit the matter or matters of such appeal to the award or umpirage of any person or persons, and to agree that such submission should be made a rule of the said Court of Queen's Bench, and to insert such agreement in their submission or the condition of the bond or promise whereby they oblige themselves respectively to submit to the award or umpirage of such person or persons ; and thereupon such and the like proceedings in all respects shall and may be taken with regard to submissions under this Act, and to enforcing awards or umpirages thereupon, and to setting aside the same, as are authorized by the said Act of King William the Third with regard to the cases therein provided for ; and every award or umpirage duly made under this Act shall be as binding and effectual to all intents as if the same had been a regular judgment of the said court of general or quarter sessions, and shall and may, on the application of either party, be enrolled among the records of the said court of sessions.

References by
order of court
of sessions.

13. That it shall be lawful for any court of general or quarter sessions of the peace before which any appeal (except against a summary conviction, or an order in bastardy, or any proceeding under or by virtue of any of the statutes relating to Her Majesty's revenue of excise or customs, stamps, taxes or post office), shall be brought, to order, with consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration to such person or persons and in such manner and on such terms as the said court shall think reasonable and proper, and such order may be made a rule of the Court of Queen's Bench, on the application of either party ; and the award of the arbitrator or arbitrators, or umpirage of the umpire, may, on motion by either party at the sessions next or next but one after such award or umpirage shall have been finally made and published, or after the decision of the Court of Queen's Bench on any motion for setting aside the same, be entered as the judgment of the court of general or quarter sessions in the appeal, and shall be as binding and

effectual to all intents as if given by the said court: provided always, that the Court of Queen's Bench may, if it think fit, on application within the term next after the making and publication of such award or umpirage, either refer the case back again to the same arbitrator, arbitrators, or umpire, or wholly set aside the award or umpirage already made, and may in the latter event order the court of general or quarter sessions to enter continuances and hear the appeal.

14. That if upon any reference to arbitration under this Act it shall be made to appear to the Court of Queen's Bench that, either from the death of the arbitrator, or arbitrators, or umpire, or from any other cause, it has become impossible that an award or umpirage can be made, it shall be lawful for the said court to order the court of general or quarter sessions of the peace to enter continuances and hear the appeal.

Where reference abortive, Queen's Bench may order sessions to hear the appeal.

15. That the several provisions relating to arbitrations contained in an Act of the fourth year of King William the Fourth, intituled "An Act for the further Amendment of the Law and the better Advancement of Justice," shall be deemed and taken to be applicable to arbitrations under this Act; and in every such arbitration the arbitrator or arbitrators, or umpire shall have the same powers of amendment which the court of general or quarter sessions of the peace would have had on the trial of the appeal.

3 & 4 Will. 4, c. 42, to be applicable to references.

Arbitrators may amend.

17 & 18 VICT. C. 125, ss. 3—117.

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham.

3. If it be made appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the

Power to court or judge

to direct
arbitration
before trial.

application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court [*or, in country causes, to the judge of any county court*] (*a*), upon such terms as to costs and otherwise, as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

Special case
may be stated,
and question
of fact tried.

4. If it shall appear to the court or a judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as herein-before provided, it shall be lawful for such court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the court upon such case and the finding of the jury or judge upon such issue or issues shall be taken and acted upon by the arbitrator as conclusive.

Arbitrator
may state
special case.

5. It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court.

Power to
judge to di-
rect arbitra-
tion at time
of trial, when
issues of fact
left to his
decision.

6. If upon the trial of any issue of fact by a judge under this Act it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbi-

(a) The words in brackets are repealed, 21 & 22 Viet. c. 74, s. 5.

trator appointed by the parties, or to an officer of the court [*or, in country causes, to a judge of any county court*] (*a*), upon such terms as to costs, and otherwise, as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial: and it shall be competent for the judge to proceed to try and dispose of any other matters in question, not referred in like manner, as if no reference had been made.

7. The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order.

Proceedings before and power of such arbitrator.

8. In any case where reference shall be made to arbitration as aforesaid the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper.

Power to send back to arbitrator.

9. All applications to set aside any award made on a compulsory reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term: and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties.

Application to set aside the award.

10. Any award made on a compulsory reference under this Act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed.

Enforcing of awards within period for setting them aside.

11. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall

If action commenced by one party after all

(*a*) The words in brackets are repealed, 21 & 22 Vict. c. 74, s. 5.

have agreed to arbitration, court or judge may stay proceedings.

agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require.

On failure of parties or arbitrators, judge may appoint single arbitrator or umpire.

12. If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such

instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively ; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

13. When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied ; and if on such a reference one party fail to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent ; provided, however, that the court or a judge may revoke such appointment, on such terms as shall seem just.

When reference is to two arbitrators and one party fail to appoint, other party may appoint arbitrator to act alone.

14. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

Two arbitrators may appoint umpire.

15. The arbitrator acting under any such document or com-

Award to be made in three

months, unless parties or court enlarge time.

pulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award : and it shall be lawful for the superior court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award ; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month ; and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.

Rule to deliver possession of land pursuant to award to be enforced as a judgment in ejectment.

16. When any award made on any such submission, document, or order of reference as aforesaid directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorizing the reference is or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award ; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.

17. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be made a rule of that court only; and if when there is no such provision a case be stated in the award for the opinion of one of the superior courts, and such court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.

Agreement or submission in writing may be made rule of court, unless a contrary intention appear.

22 & 23 VICT. C. 59.

An Act to enable Railway Companies to settle their Differences with other Companies by Arbitration.

For the better providing for the settlement by arbitration of matters in which railway companies in the United Kingdom are mutually interested, be it enacted, by (&c. &c.), as follows: (that is to say,)

1. This Act may for all purposes be cited as "Railway Companies Arbitration Act, 1859;" and the expression "railway companies" in this Act extends to and includes all persons being the owners or lessees of, and all contractors working, any railway upon which steam power is used.

Short title.
"Railway companies."

Power for railway companies to refer matters to arbitration.

2. Any two or more railway companies, whether already or hereafter incorporated (in this Act called "the companies"), from time to time, by writing under their respective common seals, may agree to refer and may refer to arbitration, in accordance with this Act, any then existing or future differences, questions or other matters whatsoever in which they then are or thereafter shall be mutually interested, and which they might lawfully settle or dispose of by agreement between themselves, and may delegate to the person or persons to whom the reference is made any power to determine all or any of the terms of any contract to be made between the companies which the directors of the companies respectively might lawfully delegate to any committees of themselves respectively.

Power to alter or revoke agreements for reference.

3. The companies jointly, but not otherwise, from time to time, by writing under their respective common seals, may add to, alter or revoke any agreement for reference in accordance with this Act theretofore entered into between the companies, or any of the terms, conditions or stipulations thereof.

Agreements to be carried into effect.

4. Every reference or agreement in accordance with this Act, except so far as it is from time to time revoked or modified in accordance with this Act, shall bind the companies, and may and shall be carried into full effect.

Reference to a single arbitrator.

5. Where the companies agree, the reference shall be made to a single arbitrator.

Reference to two or more arbitrators.

6. Except where the companies agree that the reference shall be made to a single arbitrator, the reference shall be made as follows ; to wit,

Where there are two companies, the reference shall be made to two arbitrators :

Where there are three or more companies, the reference shall be made to so many arbitrators as there are companies.

Appointment of arbitrators by companies.

7. Where there are two or more arbitrators, every company shall by writing under their common seal appoint one of the arbitrators, and shall give notice in writing thereof to the other company or companies.

Appointment of arbitrators

8. Where there are to be two or more arbitrators, if any of the companies fail to appoint an arbitrator within fourteen

days after being thereunto requested in writing by the other company, or by the other companies or any of them, then, on the application of the companies or any of them, the Board of Trade, instead of the company so failing to appoint an arbitrator, may appoint an arbitrator; and the arbitrator so appointed shall for the purposes of this Act be deemed to be appointed by the company so failing.

by Board of Trade.

9. When the reference is made to two or more arbitrators, if before the matters referred to them are determined any arbitrator dies, or becomes incapable or unfit, or for seven consecutive days fails to act as arbitrator, the company by which he was appointed shall by writing under their common seal appoint an arbitrator in his place.

Appointment of arbitrators by companies to supply vacancies.

10. Where the company by which an arbitrator ought to be appointed in the place of the arbitrator so deceased, incapable, unfit, or failing to act, fail to make the appointment within fourteen days after being thereunto requested in writing by the other company, or by the other companies or any of them, then, on the application of the companies or any of them, the Board of Trade may appoint an arbitrator; and the arbitrator so appointed by the Board of Trade shall, for the purposes of this Act, be deemed to be appointed by the company so failing.

Appointment of arbitrators by Board of Trade to supply vacancies.

11. When any appointment of an arbitrator is made, the company making the appointment shall have no power to revoke the appointment, without the previous consent in writing of the other company or every other company in writing under their common seal.

Appointment of arbitrator not revocable.

12. Where two or more arbitrators are appointed, they shall, before entering on the business of the reference, appoint by writing under their hands an impartial and qualified person to be their umpire.

Appointment of umpire by arbitrators.

13. If the arbitrators do not appoint an umpire within seven days after the reference is made to the arbitrators, then, on the application of the companies, or any of them, the Board of Trade may appoint an umpire; and the umpire so appointed shall, for the purposes of this Act, be deemed to be appointed by the arbitrators.

Appointment of umpire by Board of Trade.

14. Where two or more arbitrators are appointed, if before the

Appointment of umpire by

arbitrators to supply vacancy.

matters referred to them are determined their umpire dies, or becomes incapable or unfit, or for seven consecutive days fails to act as umpire, the arbitrators shall, by writing under their hands, appoint an impartial and qualified person to be their umpire in his place.

Appointment of umpire by Board of Trade to supply vacancy.

15. If the arbitrators fail to appoint an umpire within seven days after notice in writing to them of the decease, incapacity, unfitness, or failure to act of their umpire, then, on the application of the companies, or any of them, the Board of Trade may appoint an umpire ; and the umpire so appointed shall, for the purposes of this Act, be deemed to be appointed by the arbitrators so failing.

Succeeding arbitrators and umpires to have powers of predecessors. Reference to umpire.

16. Every arbitrator appointed in the place of a preceding arbitrator, and every umpire appointed in the place of a preceding umpire, shall respectively have the like powers and authorities as his respective predecessor.

17. Where there are two or more arbitrators, if they do not within such a time as the companies agree on, or failing such agreement, within thirty days next after the reference is made to the arbitrators, agree on their award thereon, then the matters referred to them, or such of those matters as are not then determined, shall stand referred to their umpire.

Power for arbitrators, &c. to call for books, &c. and administer oath.

18. The arbitrator, and the arbitrators, and the umpire respectively may call for the production of any documents or evidence in the possession or power of the companies respectively, or which they respectively can produce, and which the arbitrator, or the arbitrators, or the umpire shall think necessary for determining the matters referred, and may examine the witnesses of the companies respectively on oath, and may administer the requisite oath ; and in Scotland may grant diligence for the recovery of the documents or evidence, and for citing witnesses, and on application to the lord ordinary he may issue letters of supplement or other necessary writs in support of the diligence.

Procedure in the arbitration.

19. Except where and as the companies otherwise agree, the arbitrator, and the arbitrators, and the umpire respectively may proceed in the business of the reference in such manner as he and they respectively shall think fit.

20. The arbitrator, and the arbitrators, and the umpire respectively may proceed in the absence of all or any of the companies in every case in which, after giving notice in that behalf to the companies respectively, the arbitrator, or the arbitrators, or the umpire shall think fit so to proceed.

Arbitration may proceed in absence of companies.

21. The arbitrator, and the arbitrators, and the umpire respectively may, if he and they respectively think fit, make several awards, each on part of the matters referred, instead of one award on all the matters referred: and every such award on part of the matters shall for such time as shall be stated in the award, the same being such as shall have been specified in the agreement for arbitration, or in the event of no time having been so specified, for any time which the arbitrator may be legally entitled to fix, be binding as to all the matters to which it extends, and as if the matters awarded on were all the matters referred, and that notwithstanding the other matters or any of them be not then or thereafter awarded on.

Several awards may be made.

22. The award of the arbitrator, or of the arbitrators, or of the umpire, if made in writing under his or their respective hand or hands, and ready to be delivered to the companies within such a time as the companies agree on, or, failing such agreement, within thirty days next after the matters in difference are referred to (as the case may be) the arbitrator, or the arbitrators, or the umpire, shall be binding and conclusive on all the companies.

Awards made in due time to bind all parties.

23. Provided always, that (except where and as the companies otherwise agree), the umpire, from time to time by writing under his hand, may extend the period within which his award is to be made; and if it be made and ready to be delivered within the extended time, it shall be as valid and effectual as if made within the prescribed period.

Power for umpire to extend period for making his award.

24. No award made on any arbitration in accordance with this Act shall be set aside for any irregularity or informality.

Awards not to be set aside for informality.

25. Except only so far as the companies bound by any award in accordance with this Act from time to time otherwise agree, all things by every award in accordance with this Act lawfully required to be done, omitted, or suffered, shall be done, omitted, or suffered accordingly.

Awards to be obeyed.

Agreements,
arbitrations
and awards to
have effect.

26. Full effect shall be given by all the superior courts of law and equity in the United Kingdom, according to their respective jurisdiction, and by the companies respectively and otherwise, to all agreements, references, arbitrations and awards in accordance with this Act; and the performance or observance thereof may, where the courts think fit, be compelled by distress infinite on the property of the companies respectively, or by any other process against the companies respectively or their respective property, that the courts or any judge thereof shall direct [*and where requisite frame for the purpose*]^(a).

Costs of arbitration and award.

27. Except where and as the companies otherwise agree, the costs of and attending the arbitration and the award shall be in the discretion of the arbitrator, and the arbitrators, and the umpire respectively.

Payment of costs.

28. Except where and as the companies otherwise agree, and if and so far as the award does not otherwise determine, the costs of and attending the arbitration and the award shall be borne and paid by the companies in equal shares, and in other respects the companies shall bear their own respective costs.

Submission to arbitration to be made a rule of court.

29. The submission to any arbitration in accordance with this Act may at any time be made a rule of any of her Majesty's Superior Courts of Record at Westminster, or, as the case may be, at Dublin, on the application of any party interested; and the court may remit the matter to the arbitrator, or to the arbitrators, or to the umpire, with any directions the court think fit.

38 & 39 VICT. c. 55, ss. 179—181.

The Public Health Act, 1875.

Mode of reference to arbitration.

179. In case of dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorized or directed to be settled by arbitration, then, unless both parties concur in

(a) The words in brackets are repealed by 44 & 45 Vict. c. 59.

the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred.

180. With respect to arbitrations under this Act, the following regulations shall be observed ; (that is to say,) Regulations
as to arbitra-
tion.

(1.) Every appointment of an arbitrator under this Act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand, or if such party be a corporation aggregate under their common seal :

(2.) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same :

(3.) After the making of any such appointment the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation :

(4.) If for the space of fourteen days after any matter by this Act authorized or directed to be settled by arbitration has arisen, and notice in writing by one party who has duly appointed an arbitrator has been given to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fails to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties :

(5.) If before the determination of any matter so referred any arbitrator dies or refuses or becomes incapable to act, the party by whom such arbitrator was appointed may appoint in writing another person in his stead ; and if such party fails so to do for the space of seven days after notice in writing from the other party in that behalf, the remaining arbitrator may proceed *ex parte* ; and every arbitrator so appointed shall have the same powers and authorities as were vested in the arbitrator in whose stead the appointment is made :

(6.) If a single arbitrator dies or becomes incapable to act before the making of his award, or fails to make his award within twenty-one days after his appointment, or within such extended time, if any, as may have been duly appointed by him for that purpose, the matters referred to him shall be again

referred to arbitration under the provisions of this Act, as if no former reference had been made :

(7.) Where there is more than one arbitrator, the arbitrators shall, before they enter on the reference, appoint by writing under their hands an umpire, and if the person appointed to be umpire dies or becomes incapable to act, the arbitrators shall forthwith appoint another person in his stead; and if the arbitrators neglect or refuse to appoint an umpire for seven days after being requested so to do by any party to the arbitration, the Local Government Board shall, on the application of any such party, appoint an umpire :

(8.) If the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as may have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire :

(9.) The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him :

(10.) Before any arbitrator or umpire enters on a reference under this Act, he shall make and subscribe the following declaration before a justice of the peace ; (that is to say,)

“ I, A. B. do solemnly and sincerely declare that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under ‘ The Public Health Act, 1875.’

“ A. B.”

(11.) Such declaration shall be annexed to the award when made ; and any arbitrator or umpire who wilfully acts contrary to such declaration shall be guilty of a misdemeanor :

(12.) Any arbitrator, arbitrators, or umpire appointed by virtue of this Act may require the production of such documents in the possession or power of either party as they or he may think necessary for determining the matters referred, and may examine the parties or their witnesses on oath :

(13.) The costs of and consequent upon the reference shall be in the discretion of the arbitrator or arbitrators, or (in case the matters referred are determined by an umpire) of the umpire :

(14.) Any submission to arbitration under the provisions of this Act may be made a rule of any of the superior courts, on the application of any party thereto :

(15.) The award of arbitrators or of an umpire under this Act shall be final and binding on all parties to the reference :

181. All questions referable to arbitration under this Act may, when the amount in dispute is less than twenty pounds, be determined at the option of either party before a court of summary jurisdiction ; but the court may, if it thinks fit, require that any work in respect of which the claim of the local authority is made and the particulars of the claim be reported on to them by any competent surveyor, not being the surveyor of the local authority ; and the court may determine the amount of costs incurred in that behalf, and by whom such costs or any part of them shall be paid.

Claims under twenty pounds may be referred to court of summary jurisdiction.

THE ARBITRATION ACT, 1889, 52 & 53 VICT. C. 49.

An Act for amending and consolidating the Enactments relating to Arbitration. [26th August, 1889.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

References by Consent out of Court.

1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of court.

Submission to be irrevocable, and to have effect as an order of court

2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in

Provisions implied in submissions.

the First Schedule to this Act, so far as they are applicable to the reference under the submission.

Reference to
official
referee.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

Power to stay
proceedings
where there is
a submission.

4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power for the
court in
certain cases
to appoint an
arbitrator,
umpire, or
third arbi-
trator.

5. In any of the following cases:—

(a.) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator :

(b.) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy :

(c.) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him :

(d.) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

Power for parties in certain cases to supply vacancy.

(a.) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;

(b.) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the court or a judge may set aside any appointment made in pursuance of this section.

7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

Powers of arbitrator.

(a.) to administer oaths to or take the affirmations of the parties and witnesses appearing ; and

(b.) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court ; and

(c.) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

8. Any party to a submission may sue out a writ of subpoena ad testificandum, or a writ of subpoena duces tecum, but no person shall be compelled under any such writ to

Witnesses may be summoned by subpoena.

produce any document which he could not be compelled to produce on the trial of an action.

Power to
enlarge time
for making
award.

9. The time for making an award may from time to time be enlarged by order of the court or a judge, whether the time for making the award has expired or not.

Power to
remit award.

10.—(1.) In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any part of them, to the reconsideration of the arbitrators or umpire.

(2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Power to set
aside award.

11.—(1.) Where an arbitrator or umpire has misconducted himself, the court may remove him.

(2.) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.

Enforcing
award.

12. An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

References under Order of Court.

Reference for
report.

13.—(1.) Subject to Rules of Court and to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2.) The report of an official or special referee may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

Power to refer
in certain
cases.

14. In any cause or matter (other than a criminal proceeding by the Crown),—

(a.) If all the parties interested who are not under disability consent : or,

(b.) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge

conveniently be made before a jury or conducted by the court through its other ordinary officers: or,

(c.) If the question in dispute consists wholly or in part of matter of account;

the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court.

15.—(1.) In all cases of reference to an official or special referee or arbitrator under an order of the court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the court or a judge may direct.

Powers and remuneration of referees and arbitrators.

(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury.

(3.) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the court or a judge shall be determined by the court or a judge.

16. The court or a judge shall, as to references under order of the court or a judge, have all the powers which are by this Act conferred on the court or a judge as to references by consent out of court.

Court to have powers as in references by consent.

17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the court or a judge thereof under the provisions relating to references under order of the court.

Court of Appeal to have powers of court.

General.

18.—(1.) The court or a judge may order that a writ of subpoena ad testificandum or of subpoena duces tecum, shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

Power to compel attendance of witness in any part of the United Kingdom, and to order habeas corpus to issue.

(2.) The court or a judge may also order that a writ of habeas corpus ad testificandum shall issue to bring up a

prisoner for examination before an official or special referee, or before any arbitrator or umpire.

Statement of
case pending
arbitration.

19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference.

Costs.

20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Exercise of
powers by
masters and
other officers.

21. Provision may from time to time be made by Rules of Court for conferring on any master, or other officer of the Supreme Court, all or any of the jurisdiction conferred by this Act on the court or a judge.

Penalty for
perjury.

22. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly.

Crown to be
bound.

23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

Application of
Act to re-
ferences under
statutory
powers.

24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognized by that Act.

Saving for
pending
arbitrations.

25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any

agreement or order made before the commencement of this Act.

26.—(1.) The enactments described in the Second Schedule to this Act are hereby repealed to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability. Repeal.

(2.) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

27. In this Act, unless the contrary intention appears,— Definitions.

“Submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

“Court” means Her Majesty’s High Court of Justice.

“Judge” means a judge of Her Majesty’s High Court of Justice.

“Rules of Court” means the Rules of the Supreme Court made by the proper authority under the Judicature Acts.

28. This Act shall not extend to Scotland or Ireland. Extent.

29. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety. Commence-
ment.

30. This Act may be cited as the Arbitration Act, 1889. Short title.

SCHEDULES.

THE FIRST SCHEDULE.

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

a. If no other mode of reference is provided, the reference shall be to a single arbitrator.

b. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

c. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

d. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

e. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

f. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

g. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

h. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

i. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid, or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
9 Will. 3, c. 15 . . .	An Act for determining differences by arbitration.	The whole Act.
3 & 4 Will. 4, c. 42 . .	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict. c. 125 . .	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict. c. 66 . .	The Supreme Court of Judicature Act, 1873.	Section fifty-six, from "Subject to any Rules of Court" down to "as a judgment by the Court," both inclusive, and the words "special referees or." Sections fifty-seven to fifty-nine, both inclusive.
47 & 48 Vict. c. 61 . .	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven, both inclusive.

60 & 61 VICT. c. 37.

Workmen's Compensation Act, 1897.

SECOND SCHEDULE.

ARBITRATION.

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration:—

(1.) If any committee, representative of an employer and

his workmen exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as herein-after provided.

(2.) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by Rules of Court, or if in England the Lord Chancellor so authorizes, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3.) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

52 & 53 Vict.
c. 49 (*ante*, p.
40).

(4.) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

(5.) Rules of Court may make provision for the appearance in any arbitration under this Act of any party by some other person.

(6.) The costs of and incident to the arbitration and pro-

ceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by Rules of Court, and shall be taxed in manner prescribed by those rules.

(7.) In the case of the death or refusal or inability to act of an arbitrator, a Judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator.

(8.) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by Rules of Court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9.) Where any matter under this Act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to Rules of Court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by Rules of Court.

(10.) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to Rules of Court, be part of the duties of the county court, and the officers of the court shall act accordingly, and Rules of Court may be made both for any purpose for which this Act authorizes Rules of Court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such

51 & 52 Vict.
c. 43.

rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

(11.) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12.) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by Rules of Court.

(13.) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration ; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14.) In the application of this schedule to Scotland—

(a.) “Sheriff” shall be substituted for “county court judge,” “sheriff court” for “county court,” “action” for “plaint,” “sheriff clerk” for “registrar of the county court,” and “act of sederunt” for “Rules of Court :”

(b.) Any award or agreement as to compensation under this Act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral :

(c.) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts

(Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced. 39 & 40 Vict. c. 70.

(15.) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16.) In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

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[*Note.*—Throughout the Index the Arbitration Act, 1889, is referred to as “A. A., 1889.”]

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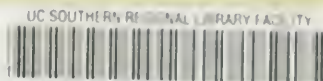
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